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Appeal Cases

BEFORE

THE HOUSE OF LORDS

AND THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

ALSO

PEERAGE CASES.

EDITOR OF HOUSE OF LORDS REPORTS—A. P. STONE, *Barrister-at-Law.*

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House of Lords—Scotch and Divorce Appeals and Scotch Peerage Cases . . .	GERALD J. WHEELER,	*Barrister-at-Law.*
Privy Council Appeals . .	HERBERT COWELL,	*Barrister-at-Law.*

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JUDGES AND LAW OFFICERS.

MEMORANDUM.

THE RIGHT HONOURABLE LORD FITZGERALD, *Lord of Appeal in Ordinary, died on October 6,* 1889, *at the residence of his brother, Fitzwilliam Place, Dublin, at the age of seventy-three.*

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BENGAL SECRETARIAT LIBRARY

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

3

PRIVY COUNCIL

[HOUSE OF LORDS.]

PARKER AND OTHERS . . . . . APPELLANTS;

AND

CATHERINE BLENKHORN . . . . . RESPONDENT;

WILLIAMSON NEWBOULD . . . . . APPELLANT;

AND

BAILWARD AND OTHERS . . . . . RESPONDENTS.

H. L. (E.)

1888

Nov. 29.

Solicitor and Client—Costs—Taxation—Remuneration for conducting Sale by Auction when Auctioneer paid by Client—Scale Fees—Solicitors' Remuneration Act 1881 (44 & 45 *Vict. c.* 44)—*Gen. Ord.* 1882, *ss.* 2, 4, 6, *Sched. I. Part I. r.* 11.

Part 1 of Sched. I. to the General Order of 1882 made in pursuance of the Solicitors' Remuneration Act 1881 (44 & 45 Vict. c. 44) prescribes an ad valorem scale fee for conducting the sale of property by public auction, and rule 11 provides that "the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer."

Where the auctioneer's commission is paid by the client:—

Held, reversing the decision of the Court of Appeal, that rule 11 does not deprive the solicitor of all remuneration for work done in respect of the conduct of the sale, but that under the General Order sect. 2, sub-sect (*c*),

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1888
PARKER v. BLENKHORN
NEWBOULD v. BAILWARD

he is entitled to a quantum meruit for such work, the remuneration to be regulated according to the old system as altered by Sched. II.

In re Newbould (20 Q. B. D. 204) reversed. *In re Faulkner* (36 Ch. D. 566) approved.

THESE two appeals were heard together, both raising the same question under the General Order of 1882 made in pursuance of the Solicitors' Remuneration Act 1881 (44 & 45 Vict. c. 44). The following extracts from that General Order and the Schedules and Rules bear upon the point in question.

"2. Subject to the exception aforesaid, the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any Court, or in the chambers of any judge or master, is to be regulated as follows, namely:—

"(*a.*) In respect of sales, purchases and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor or mortgagee, is to be that prescribed in Part I. of Schedule I. to this Order, and to be subject to the regulations therein contained.

"(*b.*) In respect of leases, and agreements for leases, of the kinds mentioned in Part 2 of Schedule I. to this Order, or conveyances reserving rent, or agreements for the same, when the transactions shall have been completed, the remuneration of the solicitor having the conduct of the business is to be that prescribed in Part 2 of such Schedule I.

"(*c.*) In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore, or in Schedule I. hereto, prescribed, but which is not, in fact, completed, and in respect of settlements, mining leases or licences, or agreements therefor, re-conveyances, transfers of mortgage, or further charges, not provided for hereinbefore or in Schedule I. hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents, and of all other business the

remuneration for which is not hereinbefore, or in Schedule I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto.

"4. The remuneration prescribed by Schedule I. to this Order is not to include stamps, counsel's fees, auctioneer's or valuer's charges. . . . .

"6. In all cases to which the scales prescribed in Schedule I. hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II. hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this Order."

Sched. I. Part 1 prescribes a scale of charges to be made by the vendor's solicitor "for conducting a sale of property by public auction, including the conditions of sale," and a further scale "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract, or conditions of sale, if any)."

The material part of rule 11 of Sched. I. Part 1 is as follows:—

"11. The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer. . . . In case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply."

In *Parker* v. *Blenkhorn* the facts were as follows:—A firm of solicitors, Parker, Garrett & Parker, were employed by the first mortgagee of freehold property in respect of a sale of the property by public auction. The solicitors instructed auctioneers to sell, and themselves attended the sale and did other work in respect of the conduct of the sale. The solicitors paid the auctioneer's charges, which included a lump sum in lieu of a percentage, and included these charges in their bill of costs. The solicitors did not charge under Sched. I. Part 1 the ad valorem scale fee for conducting a sale by public auction, but

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they charged various items for the attendance at the sale and other work done in respect of the conduct of the sale. They also charged the scale fee "for deducing title," &c. There being a small surplus after paying off the first mortgagee, the question of the solicitors' charges arose between them and the second mortgagee, the present respondent, who took out a summons for taxation.

The Taxing Master disallowed the items charged in respect of the conduct of the sale upon the authority of *In re Newbould* (1). This decision was affirmed by Chitty J., and the learned judge's decision was affirmed by the Court of Appeal (Cotton, Fry and Lopes L.JJ.) upon the same ground.

Against this decision the solicitors and the first mortgagee appealed.

1888. Nov. 27, 29. *Sir Horace Davey* Q.C. (*R. S. Wright* with him):—

The case falls within rule 11, a lump sum in lieu of a percentage being no doubt "commission" within the meaning of that rule. The items are not in dispute, and the only question is whether *In re Newbould* (1) was rightly decided. There it was held that in a case like the present where by Rule 11 of Sched. I. Part 1, the solicitor cannot charge the scale fee because the auctioneer's commission is paid by the client, the solicitor is entitled to no remuneration for all the work he does in respect of the conduct of the sale. If this be the true construction of the General Order and Schedules the result is strange: the solicitor receives nothing for some of the most important work he has to do, e.g., advising the client as to the reserve price, seeing that the particulars are accurate, attending the sale to receive the purchase-money and answer questions about title &c. The Court of Appeal in *In re Newbould* (1) read Rule 11 of Sched. I. Part 1 as if it said that where the scale does not apply the solicitor shall receive no remuneration. But the words in the beginning of Rule 11 "shall apply only" are the same as at the end where it is provided that "in case of sales under the Lands Clauses Consolidation Act the scale shall not apply." No one would contend

(1) 20 Q. B. D. 204.

that the solicitor is not to be remunerated in sales under the Lands Clauses Consolidation Act: then why is he not in sales by public auction? The matter is dealt with by General Order s. 2 sub-sect. (*c.*) which says that in respect of all other business not thereinbefore provided for the remuneration is to be regulated according to the former system as altered by Sched. II. thereto, in other words upon a quantum meruit. The appellants' contention is clearly put by North J. in *In re Faulkner* (1), where the point now in question was rightly decided. The principle of remuneration on a quantum meruit under the old system was recognized by the Court of Appeal in *In re Lacey & Son* (2) in a question under the head of deducing title. The cases of *In re Field* (3) and *In re Emanuel & Simmons* (4), relied on by the Court of Appeal in *In re Newbould* (5), were cases of leases and have no application to sales.

Cozens-Hardy Q.C. and *Oswald*, for the respondent:—

The object of the Solicitors' Remuneration Act 1881 was to exempt clients from long detailed bills of costs and charges, the amount of which they could not ascertain beforehand, and to make them liable to pay only according to a scale which they could calculate. If a solicitor does not wish to be remunerated according to the scale he has his election: he may under General Order sect. 6 by agreement with the client elect that his remuneration shall be under the old system as altered by Sched. II. Again, if he thinks it worth his while he may in the case of a sale by public auction pay the auctioneer's commission himself, and charge the client with the ad valorem scale fee for conducting the sale, and this course he will take if the commission is small and the scale fee large. If on the other hand the auctioneer's commission is large and the scale fee small he can make the client pay the auctioneer's commission, but in that case he can make no charge at all in respect of the conduct of the sale. The object of the order and rules was to have only one and not two conductors of the sale. If the solicitor comes under

(1) 36 Ch. D. 566.
(2) 25 Ch. D. 301.
(3) 29 Ch. D. 608.
(4) 33 Ch. D. 40.
(5) 20 Q. B. D. 204.

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the scale at all he must remain under it: he must take the rough with the smooth, and cannot take advantage of it in part and escape from it where it is disadvantageous. He must elect before he begins the work, or not at all: *In re Allen* (1); *Hester* v. *Hester* (2). According to the appellants' contention the solicitor can wait till the last moment when he delivers his bill before deciding whether to take the scale fee and pay the auctioneer's commission himself, or to make the client pay the latter and be remunerated himself under the old system. If rule 11 had intended that consequence, words would have been inserted similar to those in rule 10 about mortgages: "As to such transfers and further charges, the remuneration is to be regulated according to the present system as altered by Sched. II. hereto." The interpretation put by the appellant on General Order sect. 2, sub-sect. (*c*), will not hold, because the business is "thereinbefore provided for," viz. by sub-sect. (*a*). Rule 11 controls General Order sect. 4, which but for rule 11 would enable the solicitors to charge the ad valorem scale fee and make the client pay the auctioneer's commission: *In re Wilson* (3). The decisions as to leases are strictly applicable to cases of sale, there being no difference in principle.

Sir H. Davey Q.C. in reply:—

In re Wilson (3) is in the appellants' favour, for there, though the point was not argued, the Court of Appeal allowed a quantum meruit remuneration.

The appeal in *Newbould* v. *Bailward* was then heard. There a similar question arose between the vendor, Bailward, and his solicitor, Newbould, under the circumstances set forth in the report of the decision of the Court of Appeal (4).

Bowen Rowlands Q.C. (*Arthur Yates* and *F. C. Philips* with him) for the appellant.

Lumley Smith Q.C. and *G. E. S. Fryer*, for the respondents:—

The arguments were the same as in *Parker* v. *Blenkhorn*.

(1) 34 Ch. D. 433.
(2) 34 Ch. D. 607.
(3) 29 Ch. D. 790, 794–5.
(4) 20 Q. B. D. 204.

LORD HALSBURY L.C.:—

My Lords, in the case of *Parker* v. *Blenkhorn* as in that which follows, it appears to me the question lies within a very narrow compass. I absolutely decline for myself to inquire into the merits of the original taxation, as to whether there was a meritorious claim by the solicitor or the reverse.

The sole question which I believe is before your Lordships now is the true construction of the Act of Parliament and the rules made thereunder, and that question appears to be reduced to this, whether the language of the General Order sect. 2 and the sections and rules which follow it are to receive this application, —that wherever the business done by a solicitor for a client is the subject of taxation, and it can be affirmed that the particular scale does not apply, your Lordships are by construction to add that if the scale does not apply no other remuneration shall be recoverable.

My Lords, I can find nothing justifying such an interpretation in either the statute or the General Order made thereunder, or the rules made under the General Order. The scheme of the statute and of the General Order appears to me to be intelligible enough, that in respect of certain specific business which may or may not vary in the amount and degree of care and experience required in the performance of it, but as to which it is possible for the Court beforehand to prescribe what shall be a reasonable amount for such business so done,—that in respect of all such business coming within the scale which is by the statute and by the General Order applied to such business, that shall be the amount of remuneration which shall be recoverable. The statute did not mean and the General Order did not purport to enact that those scales shall be exhaustive; on the contrary in sub-sect. (*c*) of sect. 2 there is the express exception of "business not hereinbefore provided for," which in substance enacts that that business shall be charged for as heretofore. I say "as heretofore," because although that is qualified by the expression "as altered by Sched. II.," Sched. II. provides not exhaustively at all, but only in respect of certain matters, a change in the actual amount of the charges to be made therein prescribed, and it leaves untouched a very large class of business which is to be paid for according to the existing system.

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The problem which your Lordships are called upon to solve is whether in the word "regulated" in sect. 2 and the words "subject to the regulations therein contained," that is, contained in part 1 of sched. I. to this Order, or in the language of rule 11, there is or is not comprehended the implied—certainly not expressed—enactment that no other charges shall be recoverable.

By the consent of all the learned persons who have been engaged in the controversy on this subject, this is a case which comes within the first three lines of rule 11. Those words are "the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer." It is agreed by all that this is not a case to which within that language the scale applies. As I pointed out in the course of the argument, the latter part of the very same rule provides that in cases of sales under the Lands Clauses Consolidation Act and so forth, the scale shall not apply. If the same construction is to be given to the last part of rule 11 which it is contended is to be given to the very same words in the earlier part of the clause, namely, the words "shall not apply," it reduces the construction of that rule to an absurdity. The learned counsel for the respondents themselves are compelled to admit that with reference to the latter part of the rule you must apply the construction which they repudiate as being applicable to the first part of the rule; and for the very obvious reason that if in the latter part of the rule you are to add the words that no remuneration whatever shall be recoverable (which are the words they seek to introduce by construction into the earlier part of the rule), for some reason or other which no one has been able to assign the legislature has taken away from professional men engaged in such transactions all remuneration whatever for conducting sales under the Lands Clauses Act. My Lords, that is too absurd a construction to be insisted upon. But if that is too absurd, how comes it that in the very same rule as applicable to the very same subject-matter we are to understand the words "shall not apply" in one sense in the one case and give a totally different construction to the same words in the other?

My Lords, it seems to me there is no foundation whatever for saying that this case is in any way governed by the authorities on

leases which have been referred to. The Court may or may not have been right when they held that the business for which remuneration was sought was included in the scale as applicable to leases. That decision may have been right or wrong, but what relevancy has it to this case? If the business was included in the scale applicable to leases, then the scale would apply and no question would arise. If the scale applied the solicitor seeking to recover was bound by the scale. The simple proposition appears to me to be, that wherever you have established scale work you must recover and can only recover scale charges. With that exposition of the statute, it seems to me that it is simple enough in its enactments, leaving uncovered anything except that to which by the statute and by the General Order and Rules made thereunder the scale applies.

My Lords, that is simply the whole proposition, and if I were able to follow the premiss of the Master of the Rolls in the judgment he has delivered in the case of *In re Newbould* (1), I should be obliged to follow him in his conclusion, but I differ from him because I am wholly unable to adopt his language when he says: "If he can bring himself within any part of that scale he is entitled to fees according to that scale. If he cannot, he is not entitled to be paid anything."

My Lords, I am wholly unable to find any trace of such a meaning in the statute or in the General Order and Rules; and therefore as regards the first case under appeal before your Lordships, I move that the appeal be allowed, but without costs as arranged between the parties.

As regards the appeal in *Newbould* v. *Bailward* the same observations apply, and I move your Lordships that the appeal be allowed with costs.

LORD WATSON:—

My Lords, upon the main question which has been raised and argued before your Lordships in these two appeals I am of opinion with the Lord Chancellor that the judgment of the Court of Appeal must be reversed.

I agree with all the observations which have been made by

(1) 20 Q. B. D. 204.

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the noble and learned Lord; and for myself I only desire to add that the effect of the General Order when read together with its schedules and with the rules, appears to me to be simply this, that solicitors employed to sell property who do not avail themselves of the provisions of art. 6 of the Order become entitled to remuneration according to the existing system as altered by Sched. II., except in the case of professional work to which Sched. I. applies and for which a scale fee is payable in terms of that schedule. The constantly recurring expression that the scale "shall not apply" cannot in my opinion be reasonably interpreted as signifying that in cases where it is inapplicable the solicitor is to be deprived of all remuneration for his work.

LORD MACNAGHTEN:—

My Lords, I quite concur. I cannot agree with the Court of Appeal that there is no distinction to be found in the Remuneration Order between the treatment of business connected with sales and the treatment of business connected with leases. It appears to me that there is a very marked and a very important distinction. All the business connected with a lease from the commencement of the transaction down to its completion is treated as one single operation to be remunerated by one charge. The business connected with a sale (whether the sale be by private contract or by auction) is divided into two parts or stages. There is the preliminary stage, before the relation of vendor and purchaser is established. There is the final stage, which covers the deduction of title and the perusal and completion of the conveyance, and includes (as more akin to the business belonging to that stage of the transaction) the preparation of the contract or conditions of sale, if any. For each of these two parts a separate charge is prescribed in the scale schedule. If a solicitor is within the scale as regards one of these parts is he not to be remunerated for his services in regard to the other part of the transaction, unless he can bring himself within the scale as regards that part also? That is the whole question.

There is some obscurity in the language of the Order. No doubt it would have been clearer if in the scale schedule a note

had been appended in the first column to the effect that when the scale did not apply, the solicitor's remuneration in respect of business which would be covered by the scale fee, if the scale applied, was to be regulated according to the old system as altered by Schedule II. But that is, I think, the true effect of the Order when the scale schedule is read in connection with clause 2 of the Order and its sub-sections and with Rule 11.

I am therefore of opinion that Mr. Justice North was right and that these appeals ought to be allowed.

Parker and others v. *Blenkhorn:*

Order appealed from and order of the Chancery Division thereby affirmed reversed, with a direction that the bills of costs in the pleadings mentioned be referred back to the Taxing Master for further taxation. Cause remitted to the Chancery Division.

Newbould v. *Bailward:*

Order appealed from and order of the Queen's Bench Division thereby affirmed reversed with costs here and below and repayment of costs already paid, with a direction that the bill of costs in the pleadings mentioned be referred back to the Taxing Master for further taxation; cause remitted to the Queen's Bench Division.

Lords' Journals 29th Nov. 1888.

In *Parker* v. *Blenkhorn:*

Solicitors for appellants: *Parker, Garrett, & Parker.*

Solicitors for respondent: *A. M. Bradley, for Berry & Berry, Huddersfield.*

In *Newbould* v. *Bailward:*

Solicitor for appellant: *W. Newbould.*

Solicitors for respondents: *W. & J. Flower & Nussey.*

[HOUSE OF LORDS.]

H. L. (E.) 1888 Dec. 18.

GEORGE JOHN SPICER . . . . . APPELLANT;

AND

GEORGE MARTIN . . . . . RESPONDENT.

Lessor and Lessee—Restrictive Covenant—Representations—Collateral Agreement.

S. purchased from Commissioners by several conveyances the fee simple of several houses forming one block of buildings upon a site laid out in accordance with a building scheme, each conveyance containing a covenant by S. not to carry on or permit to be carried on upon the premises conveyed any trade or business but to keep the house as a private dwelling-house only, and not to do or suffer to be done upon the premises conveyed anything which might grow to the annoyance of any person who might be or become the owner, tenant, or occupier of any part of the premises then or late belonging to the Commissioners. S. afterwards granted to the respondent a lease of one of the houses containing a restrictive covenant of the same nature and a block plan of the houses. During the negotiations for the lease statements were made by S.'s solicitors to the respondent whereby he became aware that similar restrictive covenants were contained in all the leases granted by S. of houses in that block and also became aware of the terms of the conveyances of the respondent's house from the Commissioners to S.:—

Held, affirming the decision of the Court of Appeal (34 Ch. D. 1) but on a different ground, that although the statements made to the respondent did not amount to a collateral contract with him as to the future management of the estate, the respondent was from the nature of the transaction entitled to an injunction restraining S. from authorizing any of the other houses in the block to be used for the purpose of trade.

The principles defined by Hall V.-C. in *Renals* v. *Cowlishaw* (9 Ch. D. 125, 129; affirmed on appeal 11 Ch. D. 866, 869) approved.

APPEAL from a decision of the Court of Appeal.

The facts are stated in the report of the decision of the Court of Appeal (1), and are referred to in some detail in the judgments of Lords FitzGerald and Macnaghten in this House. For the present purpose the following outline will suffice:—

By a conveyance dated the 25th of March 1867, reciting that it was in pursuance of prior building agreements between the Commissioners for the Exhibition of 1851 and John Spicer, the

(1) 34 Ch. D. 1.

Commissioners conveyed to John Spicer the fee simple of the house No. 2 Cromwell Gardens, subject to a covenant that he, his heirs and assigns, would not carry on or permit to be carried on upon the premises any trade or business, but would keep and use them as a private dwelling-house only, and would not wittingly or willingly do or suffer to be done on the premises any act or thing which might grow to the annoyance, damage, or disturbance of any person who might be or become the owner, tenant, or occupier of any part of the hereditaments and premises then or late belonging to the Commissioners. The conveyance contained a block plan of the seven houses in Cromwell Gardens. By six similar conveyances of the same date the Commissioners conveyed to John Spicer the houses Nos. 1, 3, 4, 5, 6 and 7 Cromwell Gardens, the whole seven forming one block of buildings, and each conveyance contained a similar restrictive covenant.

In 1874 the respondent took from John Spicer a short lease of No. 2 Cromwell Gardens containing a block plan of the seven houses in Cromwell Gardens and a covenant similar to that in the eighty years lease hereinafter referred to, and was informed by John Spicer's solicitors that there was a covenant to this effect in the conveyance of No. 2 to John Spicer and also in the leases of his other houses in Cromwell Gardens.

In 1880 John Spicer in consideration of a high premium granted to the respondent a lease of No. 2 for eighty years subject to a covenant that the lessee and his assigns would not use the premises or permit them to be used for any trade or business or for any purpose whatever other than as a private dwelling-house, nor do or permit or suffer any act, matter, or thing to be done therein which might be or grow to the annoyance, damage, or disturbance of the lessor, his heirs or assigns, or of his or their tenants or other the owners or occupiers of lands or houses adjoining, or of any person or persons who might be or become the owner, tenant, or occupier of any part of the hereditaments or premises at Kensington then or late belonging to the Commissioners. The lease contained a copy of the block plan on the lease of 1874.

During the negotiations for this lease the respondent was informed by John Spicer's solicitors (as the fact was) that the leases

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of his other houses in Cromwell Gardens contained a similar restrictive covenant, and the abstract of John Spicer's title also disclosed to the respondent the conveyance of No. 2 from the Commissioners to John Spicer.

In 1885 one Brett, the promoter of an hotel company, arranged for the purchase of Nos. 3, 4, 5, 6 and 7 Cromwell Gardens,—as to some of them direct from G. J. Spicer (the devisee of John Spicer), and as to the others from persons on whom John Spicer's interest had devolved,—for the purpose of converting the houses into an hotel. Brett also, with G. J. Spicer's consent, negotiated with the Commissioners for a license to convert these houses into an hotel, which the Commissioners appeared willing to grant.

The respondent having brought an action for an injunction against G. J. Spicer, Brett, and the hotel company, the Court of Appeal (Cotton, Lindley and Lopes LJJ.) varying an order of Bacon V.-C. granted a perpetual injunction restraining the defendants from carrying on or authorizing to be carried on upon any part of the property known as Nos. 3, 4, 5, 6 and 7 Cromwell Gardens the trade or business of an hotel or any other trade or business, and from using the property or any part thereof or authorizing it to be used otherwise than as private dwelling-houses or a private dwelling-house (1).

Against this decision G. J. Spicer appealed.

1888. July 2, 9. *Rigby* Q.C. and *Edward Ford* for the appellant:—

There was no express contract between John Spicer and the respondent that future leases of houses in Cromwell Gardens should contain a restrictive covenant similar to that contained in the respondent's lease. Nor can any such contract be inferred from the communications between the parties either in 1874 or in 1880. If any such contract existed it would be found in the agreements or leases, which admittedly contain no such thing. Nor did John Spicer make any representation to the respondent to induce him to believe, or from which the respondent was entitled to infer, that such restrictive covenants would be required in future or would not be waived. The Exhibition Commis-

(1) 34 Ch. D. 1.

sioners were entitled to waive the restrictive covenants entered into with them by John Spicer, and if they were willing to do so there was nothing in law or equity to prevent the appellant from waiving the covenants. The Court of Appeal seem to have mainly rested their decision on the authority of *Piggott* v. *Stratton* (1), but that case is clearly distinguishable. There there was an express covenant in the lease of plots B and C that C should not be built on so as to obstruct the sea view of B. The underlessee was induced to take the underlease by a distinct representation that the sea view could not be interfered with and that the underlessee would have the benefit of this restriction. No such covenant or representation exists in the present case. The requirements made by the lessor as to the form of lease were made for the lessor's protection only and were merely part of the terms upon which alone the lessor agreed to grant a lease to the respondent. There being no collateral contract, nor any representations such as the Court of Appeal assume, the case rests upon the mere statement that the lessor's houses were subject to the restrictive covenant. There is no authority for the proposition that such a statement would entitle one of the lessees to the injunction granted by the Court of Appeal. Such an attempt has never been made on any of the great London estates.

Sir *H. Davey* Q.C. and *F. C. J. Millar* Q.C. (*A. R. Kirby* with them) for the respondent:—

The decision of the Court of Appeal may be supported on two grounds. First, the respondent was bound in his lease by a restrictive covenant and one of the inducements for entering into this lease was a representation that the lessees of the other houses were similarly bound. The negotiations in fact amounted to a collateral contract to this effect. *Piggott* v. *Stratton* (2) is an express authority as to the effect of such a representation.

Secondly, looking at all the circumstances and the nature of the transaction each occupier of one of these houses is subject to the burden and entitled to the benefit of the restrictive covenant contained in each lease. John Spicer was intended to be a

(1) John. 341; 1 D. F. & J. 33.
(2) John. 341, 355; 1 D. F. & J. 33, 48.

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trustee for each lessee of the benefit of the covenants entered into by the other lessees. The doctrine which entitles the respondent in the present case to have the benefit of the restrictive covenant is well stated by Hall V.C. in *Renals* v. *Cowlishaw* (1), with every word of whose judgment the Court of Appeal entirely concurred. As pointed out in the judgment of Hall V.C. the right is established whenever the Court is satisfied that it was the intention that each of the purchasers (or lessees) should be bound by and should as against the others have the benefit of the covenants entered into by each. And see *Child* v. *Douglas* (2); and *Western* v. *Macdermott* (3).

Rigby Q.C. in reply referred to *Child* v. *Douglas* (4) as ultimately decided by Wood V.C., and to *Keates* v. *Lyon* (5), and *Master* v. *Hansard* (6).

The House took time for consideration.

1888. Dec. 18. LORD FITZGERALD:—

My Lords, in dealing with the questions in this case your Lordships may look at the title of Mr. Spicer as disclosed on the conveyance before us and appearing on the abstract of title submitted to the solicitors who represented the respondent Martin in the negotiations with Mr. Spicer, and also at the occurrences of 1874 on the negotiations for the lease for fourteen years. That lease is directly connected with the lease for eighty years, which was made during the continuance of the lease for fourteen years. Both leases are between the same parties and negotiated between the same solicitors. The solicitors for Mr. Martin had apparently the same information and the same statements before them on both negotiations.

The fourteen years' lease of No. 2 to George Martin, the respondent, is preceded by an agreement which provides that the lease should, inter alia, contain "such other covenants as are usual and comprised in the lessor's lease." By "lessor's lease"

(1) 9 Ch. D. 125, 129; 11 Ch. D. 866.
(2) Kay, 560; 5 D. M. & G. 739.
(3) Law Rep. 2 Ch. 72.
(4) 2 Jur. (N.S.) 950, 952.
(5) Law Rep. 4 Ch. 218.
(6) 4 Ch. D. 718.

is meant the conveyance from the Commissioners to Spicer. It was in the course of the negotiations for that lease that the present appellant, then acting as solicitor for his late father, John Spicer, in sending the draft of the lease for fourteen years to George Martin for approval, writes on the 26th of February, 1874: "I may, perhaps, add that the draft is the form used for the other houses in Cromwell Gardens." That draft lease contains a covenant on the part of the lessee that the demised premises should not be used "for any purpose whatsoever other than as a private dwelling-house," with a marginal observation by the present appellant in these words: "There is a covenant to this effect in the conveyance of these premises to Mr. Spicer. G. J. S." That lease was executed in the terms of the draft.

In 1880 Mr. Martin, availing himself of a provision in the lease of 1874 (that is, the fourteen years lease), gave notice of his intention to surrender in 1881, but there never was a surrender, in fact, of that lease. Negotiations were entered on for the purchase of a lease for eighty years, which, when completed by the execution of the new lease, created a surrender by operation of law of the earlier lease. Your Lordships have not before you the earlier portion of these negotiations, but we may look at the position of the parties and the circumstances of the sale. The parties were the same, the solicitors were the same, and Martin was then still in possession under the lease of 1874.

There is a letter from Martin to John Spicer, relating apparently to the notice of surrender, in which he quotes and sends to him a letter from his solicitors in which they ask him to get Mr. Spicer's acknowledgment of the receipt of that notice—"and then we can put it with our papers." This passage seems to indicate that Ashurst & Co. retained the papers connected with the lease of 1874, and had before them the statement contained in the letter of the 26th of February 1874.

The terms of the new contract appear to have been substantially arranged before the 21st of September 1880, for on that day the present appellant writes to Ashurst & Co.: "I send you the draft contract for sale of No. 2 Cromwell Gardens." That draft agreement deserves the special attention which was given to it in argument and will be given to it in the judgment which

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my noble and learned friend (Lord Macnaghten) will deliver after me. I have already read his judgment, and I concur in the observations on it which will be made by my noble and learned friend, and in the inferences he will deduce. It will be seen that the agreement for the lease for eighty years was subsequently carried into effect by a lease prepared by the present appellant.

My Lords, it seems to me that these two transactions run into each other and are not to be separated, and that each was subject to and brought about by the same statement that the whole of this property of the seven dwelling-houses was on the part of both the landlord and his lessees subject to the same restriction, that the houses were to be used as dwelling-houses only, and for no other purpose, and that the purchaser, Martin, was to be subject to and to have the benefit and protection of that restriction. I cannot doubt that both parties so intended in honesty and good faith. The transaction of 1880 was really this, that Martin purchased the larger term of eighty years, commencing from a date then three years past, at a lesser rent, but for which he paid a premium of £11,000. It was but the extension of the same relation of lessor and lessee for a longer term and at a reduced rent, and the statements which affected the first were, as it appears to me, equally applicable to the second lease.

There is, my Lords, every ingredient in this case from which we may reasonably infer an intention that the lessees or purchasers were to be protected by and have the benefit of the restrictive covenant as between Spicer and the Commissioners and to be bound by a similar obligation entered into by each on his own behalf.

It can make no difference that Spicer's obligation to the Commissioners was split up by the adoption of a separate conveyance in fee of each of the seven building lots. The restrictive obligation was applicable to each and every of the seven houses, and Mr. Spicer has himself, whilst giving notice to his lessees and assigns of the obligation he had undertaken, stipulated that they severally should enter into a similar covenant as to his own holding.

My Lords, I cannot entertain any reasonable doubt that, as between the appellant and the respondent, the latter was,

according to right and justice, entitled to the full benefit and protection of the restrictive covenant which the vendor had entered into with the Commissioners. The appellant Spicer alone contests the respondent's claim. The lessees or purchasers of two other of the seven houses were made defendants, but offered no opposition, and the other defendants, Brett and the intended hotel company, have vanished.

My Lords, in my opinion the decision of the Court of Appeal should be affirmed, and so affirmed on the ground and for the reasons which I have given, namely, that the lessee, whilst he was on the one hand subject to the obligation of the restrictive covenant contained in his lease, was also, on the other hand, entitled to the benefit of the covenant entered into by Spicer with the Commissioners to the same effect. The decision of the Court of Appeal proceeded on a question somewhat different, being one of mixed fact and law, which may be thus expressed, viz. whether the representations alleged to have been made by or on behalf of Spicer were so made and were such as that the Court ought to deduce from those representations a collateral contractual obligation on his part with Mr. Martin that the tenants of the other six dwelling-houses should be severally bound to use the houses as and for private dwelling-houses only, and not otherwise; and that he, Mr. Spicer, would not permit his property to be used save in accordance with that obligation. The houses Nos. 3, 4, 5 and 7 had been dealt with by John Spicer prior to 1874, and the leases each contained that restrictive covenant. In 1876 Hammersley acquired No. 6, but subject to the same restriction. The same observation applies to the dealing with Shafto as to No. 3 in 1876.

In the view which I have expressed as to the proper ratio decidendi, it is not now necessary to express an opinion on the difficult question on which the Court of Appeal acted. I desire to say, however, that if I had been called on now to express an opinion on it, the inclination of my mind would be in favour of the view on which the judgment of the Court of Appeal rested. The temptation of a large price was unfortunately sufficient to induce the appellant to become active in assisting to defeat the arrangement he had so entered into.

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It is not necessary here to examine in detail the action of the appellant. He was not only active in promoting the design of Mr. Reginald Brett, but he has maintained at the bar here his right to do so.

It makes no difference that the actual project has come to an end since the institution of the suit, and possibly because of its institution. The suit became necessary because of the action of the appellant, and the respondent is entitled to an injunction in the modified form adopted by the Court of Appeal.

I move your Lordships therefore that the decision of the Court of Appeal be affirmed and the appeal dismissed with costs.

LORD MACNAGHTEN :—

My Lords, the learned counsel for the respondent put their case in two ways.

Adopting the arguments which seem to have found most favour with the Court of Appeal, they contended that the communications addressed to Mr. Martin and his solicitors by Mr. Spicer's solicitor involved representations which amounted to a collateral contract by Mr. Spicer as to the future management of the estate on which Mr. Martin was induced to purchase a residence.

They also contended that, under the circumstances of the case, having regard to the nature of the transaction which resulted in that purchase, Mr. Martin was entitled to the benefit of the restrictive covenant which the Commissioners for the Exhibition of 1851 imposed on Mr. Spicer, and through Mr. Spicer on all persons deriving title from him to any portion of the estate.

Certainly the communications which passed between the parties are not to be disregarded. They form part of the transaction. They serve to record some facts which otherwise might have been left to inference or conjecture. But still, if the true view were that "this case really turns on the correspondence," to use the language of one of the learned judges, or "really depends upon the construction of the letters which passed between the plaintiff and the defendant Spicer," as another member of the Court sums up the question, I should have had a difficulty in advising your Lordships to affirm the decision under appeal.

Mr. Martin's connection with the estate began in 1874. On

that occasion no correspondence of any sort or kind appears to have passed between the parties until Mr. Martin had entered into a binding agreement to take a lease of No. 2 Cromwell Gardens. The lease was to be for a term of fourteen years, determinable by the lessee at the end of the first seven years. One of the conditions of the agreement was, that the lease should contain "such covenants as are usual and comprised in" the conveyance to the lessor. Shortly afterwards a draft lease on a lithographed form, with some alterations in writing, was sent to Mr. Martin. It contained a covenant in the terms of the covenant now in question. It was accompanied by a letter, which stated that the draft was "the form used for other houses in Cromwell Gardens, and, in fact, for all the houses on Mr. Spicer's estates." In the margin of the draft, opposite to a written addition extending the benefit of the covenant to the owners, tenants and occupiers of any part of the estate then or lately belonging to the Exhibition Commissioners, there was a note in these words: "There is a covenant to this effect in the conveyance of these premises to Mr. Spicer."

In due course the draft was approved, and the lease was executed in May 1874. In the margin of the lease there was a block plan of Cromwell Gardens shewing Mr. Martin's house by a distinguishing colour.

In 1880 notice was given to terminate this lease at the end of the first seven years. Then there were negotiations for a new lease of the same premises for a long term of years, at a premium of £11,000. A draft agreement was sent by Mr. Spicer's solicitor to the solicitors who acted for Mr. Martin, which originally contained this clause: "The said lease shall contain such covenants, conditions, and agreements, on the part of the purchaser or lessee, as are usually contained in leases granted by the said vendor of his other houses in Cromwell Gardens." Mr. Martin's solicitors asked for "a copy of the form of lease referred to in the draft agreement as in use on the estate." They said they could not settle the draft without it. They also suggested that the shortest plan would be for Mr. Spicer's solicitor to prepare and send to them the draft lease, which might then be annexed to the agreement. A form of lease was accordingly sent, which

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apparently was a copy of a lease actually granted to a tenant of one of the other houses in Cromwell Gardens. Accompanying this document, which again contained the restrictive covenant, there was a letter in these words, "As promised, I beg to forward draft of proposed lease herein." The draft was approved, and scheduled to the agreement, which was altered in the clause I have quoted, so as to make it refer to the draft lease as the form of lease to be granted in pursuance of the agreement. The lease itself was executed on the 24th of December 1880. The plan upon it was a copy of that on the former lease.

I have now stated the whole of the communications which passed between the parties from the very beginning to the end of the transaction, so far as they are relevant to the present question.

Whatever construction may be placed upon the communications which passed in 1874, I much doubt whether they are so connected with the transaction that took place seven years afterwards as to entitle Mr. Martin to rely upon them as a representation inducing the contract of 1880. But, however that may be, I must confess that I am unable to see any difference as regards the question now before your Lordships, between the communications which took place in 1874 and those which took place in 1880. On the first occasion the information was furnished in fulfilment of an antecedent obligation contained in the agreement for a lease. On the second occasion the information was supplied in compliance with a request by Mr. Martin's solicitors who wanted it in order to enable them to settle the draft then before them. In each case the representation which was made was nothing more than a simple statement as to the terms of the restrictive covenant which, for himself and his sequels in right, Mr. Spicer had contracted to observe. In itself the statement was admittedly accurate. It was not in my judgment designed or calculated to put Mr. Martin off his guard. It was not intended or apparently understood to convey any assurance as to the continuance of the existing state of things.

In this respect the present case is altogether different from the case of *Piggott* v. *Stratton* (1), on which the judgment of the Court of Appeal seems to be founded.

(1) John. 341; 1 D. F. & J. 33.

In *Piggott* v. *Stratton* (1) one Stratton had taken a building lease of two plots of ground in the Isle of Wight. There was a restrictive covenant in respect of plot C, with the object of preserving an uninterrupted view of the sea for the benefit of houses to be erected on plot B. Stratton granted an underlease of plot B. During the negotiations for the underlease he had told the underlessee that he was prevented by the terms of his lease from building so as to obstruct the sea view. On this assurance the underlease was taken, and villas were built which were afterwards acquired by Piggott. Stratton then went to the lessor and surrendered his lease for the purpose of getting rid of the restrictive covenant. But it was held that the obligation of the covenant still remained. What was actually said by Stratton may have been nothing more than a representation, accurate in itself, of an existing fact. But it was intended to be understood, and was in fact understood, as an assurance that he had no power to obstruct the sea view during the currency of the lease, and that so long as the underlease lasted, the underlessee would be safe from the apprehended obstruction. That was a case of bad faith, and the Lord Chancellor denounced Stratton's conduct in terms which would be absurdly extravagant if applied to the conduct of the Commissioners, or to the conduct of the appellant. There is no room for any charge of bad faith in the present case. Strange as it may seem, I have no doubt that both the Commissioners and the appellant honestly thought that they were not even acting unreasonably or unfairly to Mr. Martin.

Although the correspondence of itself would not, as I venture to think, give the respondent a right to the interposition of the Court, the question still remains whether Mr. Martin was not, under the circumstances, entitled to the benefit of the restrictive covenant.

On this branch of the case Lord Justice Cotton apparently would have been in favour of the respondent. But the point did not form the ground of his decision.

The law on the subject has never been stated more clearly than it was by Vice-Chancellor Hall in *Renals* v. *Cowlishaw* (2). The opinion of that learned judge on any question relating to conveyancing and real property law, owing to his great experience

(1) John. 341; 1 D. F. & J. 33.

(2) 9 Ch. D. 125, 129.

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as a conveyancer, would of itself carry the utmost weight. In this instance his opinion was emphatically confirmed in the Court of Appeal (1), where Lord Justice James expressly concurred in every word of the Vice-Chancellor's judgment. It has also, I may observe, been approved and followed in the Queen's Bench Division: *Nottingham Patent Brick and Tile Company* v. *Butler* (2).

"It may I think," observes the Vice-Chancellor, "be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the Court is satisfied that it was the intention that each one of the several purchasers should be bound by and should as against the others have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase."

I should be disposed to hesitate if I were invited to extend the principles recognised in *Renals* v. *Cowlishaw* (3). But those principles, as defined by the Vice-Chancellor, are I think perfectly sound, consistent with the authorities, and consistent with good sense. I think they apply to the present case, and I think they must govern it.

If the site of the houses now known as Cromwell Gardens had been put up for sale by auction in building lots, according to a plan corresponding with that on Mr. Martin's lease, and if the conditions of sale had prescribed that houses should be built such as those which have actually been erected, and that every

(1) 11 Ch. D. 866.
(2) 15 Q. B. D. 261, 269; S. C., on appeal, 16 Q. B. D. 778.
(3) 9 Ch. D. 125.

purchaser should bind himself by a covenant, in the terms of the restrictive covenant now in question, no one, I think, could have doubted that each purchaser would, as against the vendor, and as against every co-purchaser, have had a right to the benefit of the covenant, although there might have been no direct stipulation to that effect, and no express provision for mutual covenants by the purchasers inter se. What difference is there in substance between the case I have supposed and the case which has occurred? The site was laid out in accordance with a building scheme. The houses were to be built as private houses, and to be used for no other purpose: a covenant to that effect was imposed on the builder who bought the ground, and intended to parcel it out and sell it, or let it again. The houses were actually built as private houses, and offered to the public as such. Their character was unmistakeable; and every person who took one of the houses was required to enter into the same restrictive covenant. All this in one way or another was brought to Mr. Martin's knowledge. Every lessee in ordinary course must have had the same information as Mr. Martin had. Every lessee must have known that every other lessee was bound to use his house as a private residence only. This restriction was obviously for the benefit of all the lessees on the estate; they all had a common interest in maintaining the restriction. This community of interest necessarily, I think, requires and imports reciprocity of obligation.

As regards the appellant, the case, I think, is doubly clear. It seems to me that when Mr. Spicer put his houses in Cromwell Gardens on the market he invited the public to come in and take a portion of an estate which was bound by one general law—a law perfectly well understood, and one calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses. The benefit of that increase, whatever it was, Mr. Spicer got. Can he or his representative be permitted to destroy the value of the thing he sold by authorizing the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole?

For these reasons I think the judgment of the Court of Appeal ought to be affirmed, and the appeal dismissed with costs.

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LORD WATSON:—

My Lords, in this case I have had the advantage of considering in print the judgment which has just been delivered by my noble and learned friend (Lord Macnaghten), and finding there all that I could desire to say myself, I shall simply express my concurrence.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 18th December 1888.

Solicitors for the appellant: *Foster & Spicer.*
Solicitors for the respondent: *Ashurst, Morris, Crisp & Co.*

[HOUSE OF LORDS.]

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CHARLES RODNEY HUXLEY (PAUPER) . APPELLANT;

AND

THE WEST LONDON EXTENSION RAILWAY COMPANY . . . . . } RESPONDENTS.

Practice—Costs—Trial with Jury—Jurisdiction of Judge to deprive Plaintiff of Costs—"Good Cause"—Discretion—Appeal as to "Good Cause"—Judicature Act 1873 (36 & 37 *Vict. c.* 66) *s.* 49—*Rules of the Supreme Court* 1883 *Order* LXV. *r.* 1.

In an action against a railway company for damages caused by their negligence tried by a judge with a jury the plaintiff recovered £50. The defendants having thereupon applied that the plaintiff should be deprived of costs under Order LXV. r. 1 of the Rules of the Supreme Court 1883, the judge refused to exercise his discretion, but after some weeks heard both sides and made an order depriving the plaintiff of costs on the ground that he had supported an extravagant and extortionate claim by fraudulent statements and dishonest acts and by evidence which the jury disbelieved:—

Held, affirming the decision of the Court of Appeal, that the judge was not functus officio when he refused to exercise his discretion at the trial, that he had jurisdiction to make the order, and that the ground on which it was made constituted "good cause" within the meaning of Order LXV. r. 1.

By Lords Watson, Bramwell, and Herschell:—The concluding words of Order LXV. r. 1 of the Rules of the Supreme Court 1883 which give

the judge or Court a discretion as to costs "for good cause" in trials with a jury, embrace everything for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense. So long as the judge or Court deal with considerations of that kind, the sufficiency or insufficiency of these considerations as affording a reason for disallowing costs are matters of which they are constituted sole arbiters; they are acting within their jurisdiction and their decisions are final and conclusive. On the other hand, if they give effect to considerations which do not constitute "good cause" within the meaning of the Rule, they exceed the limits of their jurisdiction; and on that ground their decisions are not protected from review.

The decision in *Jones* v. *Curling* (13 Q. B. D. 262) discussed.

APPEAL from a decision of the Court of Appeal.

The action was brought by the appellant against the respondents for damages for negligence in carrying the appellant as a passenger on their railway, and he claimed £3000.

The statement of defence alleged that there was no negligence on the defendants' part; that there was contributory negligence on the plaintiff's part; that the plaintiff might by the exercise of ordinary care have avoided the consequences of the defendants' negligence (if any); and that the plaintiff was not injured as alleged.

At the trial before Lord Coleridge C.J. and a special jury on the 2nd, 3rd, and 4th days of December 1885, the jury found a verdict for the plaintiff for £50. The defendants' counsel having applied to Lord Coleridge to deprive the plaintiff of costs under Order LXV. r. 1, his Lordship—although of opinion that the plaintiff had preferred an extravagant and extortionate claim, had supported it by fraudulent statements and dishonest acts, and had endeavoured to substantiate it before the jury by evidence which they very properly disbelieved—declined to exercise any jurisdiction in the matter upon the ground that the later decisions of the Court of Appeal (especially that of *Jones* v. *Curling* (1)) had made the principles on which such jurisdiction was to be exercised wholly unintelligible to him (2).

On the 10th of December the plaintiff entered up judgment for himself for £50 and costs.

The defendants having given the plaintiff notice that the

(1) 13 Q. B. D. 262. (2) 17 Q. B. D. at p. 374.

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Court of Appeal would be moved on their behalf that the order of Lord Coleridge as to costs made on the 4th of December and the refusal of Lord Coleridge to order for good cause that the plaintiff's costs should not be paid by the defendants might be reversed, and that it might be adjudged that the plaintiff was not entitled to be paid his costs in the action by the defendants, the matter was argued before that Court (Lord Esher M.R., Cotton and Bowen L.JJ.), the plaintiff's counsel agreeing not to raise the question whether the application ought not to have been to the Divisional Court. On the 16th of December the Court of Appeal made an order "that the defendants have leave to renew the application to the Lord Chief Justice, and if he declines jurisdiction to apply to the Divisional Court. Stay of execution in meantime."

On the 18th of December the defendants accordingly applied to Lord Coleridge who heard the arguments on the 13th of January 1886. On the 5th of April Lord Coleridge made an order that the plaintiff be deprived of his costs of action for the reasons given in the report (1).

From this order the plaintiff appealed to the Court of Appeal (Lord Esher M.R., Bowen and Fry L.JJ.) who on the 15th of February 1887 dismissed the appeal with costs. Against this decision the present appeal was brought by the plaintiff.

Sect. 49 of the Judicature Act 1873 (36 & 37 Vict. c. 66) is as follows:—

"No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order."

Order LXV. r. 1 of the Rules of the Supreme Court 1883 says:—

"Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge: . . .

"Provided also that, where any action, cause, matter or issue

(1) 17 Q. B. D. 373.

is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order.

1889. March 14, 18. *Crump* Q.C. and *W. Lynden Bell* for the appellant:—

The order of Lord Coleridge C.J. of April 5 1886 and that of the Court of Appeal of February 15 1887 were wrong and ought to be reversed for two reasons. First because Lord Coleridge C.J. having refused at the trial on December 4 1885 to deprive the plaintiff of the costs of the action and judgment having been entered for the plaintiff for £50, the amount of the damages given by the jury, and costs, Lord Coleridge was functus officio and had no jurisdiction to make the order of April 5 1886. The matter was res judicata on December 4 1885. Knowing the consequences Lord Coleridge refused to interfere, exercised his discretion, and allowed the law to take its course. A refusal to exercise jurisdiction or discretion or to make an order is itself an order, and the defendants so treated it in their notice of motion to the Court of Appeal—calling it an "order as to costs." Unless it was an order the Court of Appeal had no jurisdiction to hear the motion or make the order of December 16 1885. The proceedings in the Court of Appeal were indeed irrelevant, whether Lord Coleridge was functus officio or not. If his Lordship was functus officio the Court of Appeal could not give him jurisdiction. If he was not he had jurisdiction without the assistance of the Court of Appeal. Clearly his Lordship thought he had made an order, for he recommended the defendants to go to the Court of Appeal. To say "I am not adjudicating: but I do not interfere," is a contradiction in terms. The adjudication took the form of refusing to do anything. The learned judge having refused to deprive the plaintiff of costs, the defendants ought to have gone to the Divisional Court. The matter being therefore res judicata, the order of April 5 1886 was a nullity. If such an order can be made there is no limit of time at which a judge cannot interfere.

Secondly, there was no "good cause" within Order LXV. r. 1 for depriving the plaintiff of costs. Even assuming that the

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plaintiff had tried to deceive the Judge, this is not one of the class of cases in which the Judge ought to exercise his discretion. In *Myers* v. *Defries* (1) Bramwell L.J. said: "Independently of the decision of the House of Lords in *Garnett* v. *Bradley* (2), I quite agree that the old law as to costs is gone; but we may look upon it as a guide, for the former rules as to apportioning the liability for costs were in themselves reasonable and ought to be followed whenever it is practicable." The old law as to costs is so far an indication of the mode in which the new order ought to be read. Before the Judicature Acts and Rules there were only four statutes which deprived a plaintiff of costs: 43 Eliz. c. 6 s. 2, as to 40*s*. recovered; 21 Jac. 1 c. 16 s. 6, as to slander where less than 40*s*. is recovered; 3 & 4 Vict. c. 24 s. 2, and the County Courts Act 1867 (30 & 31 Vict. c. 142) s. 5. Through all those statutes there ran the same principle, that if the plaintiff recovered unsubstantial damages he should get no costs. Here the damages are substantial. In cases where though the damages recovered are substantial yet the action is vexatious or the plaintiff has misled the defendant, e.g. by stating a wrong cause of action when he has a right one, there is "good cause." But this is not one of those cases. Here the defendants ought to have paid money into Court, or at least made an offer; but they were as much in the wrong as the plaintiff, having denied the negligence and the liability altogether and compelled the plaintiff to bring an action. The parties being in pari delicto it is not a case for depriving of costs. Moral delinquency is not "good cause," e.g. contempt of Court. The practice in the Chancery Court is no guide; in cases tried by a judge with a jury the discretion is not the same as in cases without a jury. Where there is no jury "good cause" is not required. But even in Chancery this plaintiff would have been entitled to costs. He was not guilty of oppressive or vexatious conduct or of misconduct within the definition given by Sir G. Jessel M.R. in *Cooper* v. *Whittingham* (3): "Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion

(1) 5 Ex. D. 180, 184. (2) 3 App. Cas. 944.
(3) 15 Ch. D. 501, 504.

and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts; for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind the rule is plain and well settled, and is as I have stated it." In *Harnett* v. *Vyse* (1) the plaintiff was deprived of costs, but he had by misconduct brought the libel (for which the action was brought) on himself, and the verdict was only for £10. There is no case where a plaintiff having obtained £50 has been deprived. This plaintiff was compelled to bring the action by the defendants' misconduct and has obtained substantial damages.

Murphy Q.C. and *Wightman Wood* for the respondents were not heard.

LORD HALSBURY L.C.:—

My Lords, I somewhat regret that the course of this litigation hardly calls upon your Lordships to decide the question which appears to have divided the opinions of the Court of Appeal and of the Lord Chief Justice; because it appears to me that whether the discretion created by Order LXV. under the statute is open to review or not, the circumstances of this case shew that the order under appeal must be affirmed. If it could have been made out that the Lord Chief Justice was functus officio when he first refused to interfere in the matter and to exercise the discretion with which the statute and the order invested him, I should quite agree that the matter could not have been put right afterwards by the Court of Appeal in the somewhat curious manner in which it was sought to be put right; because if the Lord Chief Justice was functus officio the Court of Appeal had no jurisdiction to do otherwise than either affirm or disaffirm his order. They appear to have suggested that the parties should go back to the Lord Chief Justice and see whether they could obtain from him another judgment than that which he had already pronounced, if it could be called a judgment.

(1) 5 Ex. D. 307.

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My Lords, upon the return of the parties to the Lord Chief Justice, the Lord Chief Justice shewed I think, as indeed he had originally shewn, that he had never decided the question at all; and it would be an abuse of language to say that he was functus officio, because he had decided nothing and had said so in express terms. I follow the very ingenious argument of Mr. Bell, and I quite agree that very often a judgment is a perfectly good judgment although it consists in saying nothing. But one cannot dissociate the Lord Chief Justice's observations from what he did; because he said, "I will not interfere—I will not exercise any discretion at all upon the subject, inasmuch as I do not understand the judgment of the Court of Appeal in a former case." The result of that is that the Lord Chief Justice not having decided and there being no limit as to time in this statute or in this Order, the matter goes back to the Lord Chief Justice, and upon that occasion he does exercise his discretion and does pronounce an order which is the order under appeal.

Now, my Lords, the question of the learned judge's discretion is either open to review or it is not. If it is not open to review there can be no question for your Lordships—it has been decided; if it is open to review the question which your Lordships have to determine is whether there is "good cause" or not. I have no hesitation in saying that there seems to me to be perfectly good cause. The statute and the order have entirely reversed the old law as to costs, and they have given a discretion as to costs to the learned judge who presides at the trial or to the Court, for it is in the alternative. But whatever may be involved in that discretion I cannot entertain a doubt that everything which increases the litigation and the costs, and which places upon the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of his costs. And if that be an accurate representation of the principle upon which the costs may be taken from the plaintiff, what doubt can there be that in this particular case the Lord Chief Justice has exercised a sound discretion and has for good cause deprived the plaintiff of his costs, when upon the facts, which it is no longer possible to dispute, an extravagant claim has been made where a moderate one might have been made,

and a course has been pursued of deliberate deceit by which the company were sought to be defrauded, and a sort of performance was gone through to induce the Court and jury to believe that much more serious injuries had been inflicted upon the plaintiff than really had been inflicted upon him?

It is said, "The defendants were guilty of negligence and the jury have found that they inflicted damage to the extent of £50, and therefore there can have been no extra costs incurred by reason of the misrepresentation, because they ought to have paid into court the £50 and ought not to have denied their negligence." It seems to me that that is an entire misapprehension of what a railway company or any other such defendant is bound to do. When a claim is made upon them they are bound to investigate it. It is common knowledge that claims of this kind are made where there is no foundation for them; and if the plaintiff has himself by a course of fraudulent deceit called upon the company to undergo expenses which they would not have had to undergo, and to go through an expensive trial which they might not have had to go through if he had fairly and truly stated what the extent of his injuries was, I cannot conceive a more appropriate case for the exercise of the discretion than that which those facts present.

Under these circumstances, my Lords, I move your Lordships that this appeal be dismissed.

LORD WATSON:—

My Lords, the concluding provision of Order LXV. r. 1 appears to me to contemplate that the discretionary power to set aside the general rule "for good cause" shall be exercised once for all by the judge or Court, and when duly exercised shall not be subject to review. But I do not think that any and every reason which may be assigned for disallowing the costs of a successful party must necessarily be accepted as "good cause" within the meaning of the Rule. I shall not attempt a complete definition of what is meant by these words. They at all events embrace, in my opinion, everything for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion

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unnecessary litigation and expense. So long as the judge or Court deal with considerations of that kind, the sufficiency or insufficiency of these considerations as affording a reason for disallowing costs are matters of which they are constituted sole arbiters; they are acting within their jurisdiction, and their decisions are final and conclusive. On the other hand if they give effect to considerations which do not constitute "good cause" within the meaning of the Rule, they exceed the limits of their jurisdiction; and on that ground their decisions are not protected from review.

In this case I am satisfied that the learned Chief Justice did not on the 4th of December 1885 decide that the general rule was to take effect. The noble and learned Lord intimated that, if he had exercised the jurisdiction given him by the Rule, he would have deprived the appellant of costs. He neither decided that he had no jurisdiction, nor professed to exercise it; he simply declined to entertain the respondents' application. Such a declinature could not impair the jurisdiction which the Rule confers; and seeing that no limit of time is prescribed within which application must be made, I think his Lordship had full power to dispose of the respondents' motion when it was renewed in January 1886.

I entertain no doubt that the considerations by which his Lordship was influenced in pronouncing the order of the 5th of April 1886 were good cause in the strictest sense of the term. The improper artifices to which the appellant resorted for the purpose of inflaming damages were in the highest degree calculated to promote vexatious litigation, to increase the costs incurred by the respondents, and to prevent any settlement of his claim upon reasonable terms. I have no right to criticise his Lordship's decision, but I cannot refrain from saying that, in my opinion, there could hardly be a more appropriate case for making an exception from the general rule.

LORD BRAMWELL:—

My Lords, I will only say a few words upon what may be called the merits of this case; that is to say whether, supposing all the formalities were right, the noble and learned Lord who tried this

case was right in making the order which he did make depriving the plaintiff of his costs.

Mr. Bell has made a very gallant fight, but I entirely agree to what has been said by my noble and learned friend opposite (Lord Watson), and I cannot improve upon what he has said in any way. I think that if ever there was a case in which a man was properly deprived of his costs it is this case. I continue of the opinion that the Rule is unfortunately expressed; and it seems to me that there have been some very remarkable cases decided upon it. What I should say upon them if they came before this House for review it is not necessary to say now, and I will not say anything upon them now; but I will make a remark upon the former case of *Jones* v. *Curling* (1) which was before the Lord Chief Justice, and where he held that there was good cause but was overruled. I must say that I share his astonishment at that decision which so perturbed him.

Mr. Bell cited the case of *Myers* v. *Defries* (2) and some observations of mine. I cannot help thinking that one might apply the very principle of that case to this. The costs of issues, notwithstanding the change in the law, still go according to the findings. Now this is not a case in which there were costs of issues—that is to say no issue was found for the defendants that I know of; that is, no specific determinate issue—but a great many of the things which the plaintiff affirmed were found for the defendants. There is, however, no Rule under which the learned judge who tried the case could say, "The defendants shall get the costs that they have been put to by unfounded allegations and statements and attempts at proof, and the plaintiff shall get the costs of those upon which he has succeeded"; but the Rule, by giving a discretion to the judge, has enabled him to do substantial justice, so that while he could not say, "I will apportion the costs according to the actual findings," he could still say, "The plaintiff shall get none"; and I quite agree, as I have said, with my noble and learned friend opposite that if there ever was a case in which there was good cause this is such a case, according to the opinion which the noble and learned Lord who tried the case had of it.

(1) 13 Q. B. D. 262. (2) 5 Ex D. 180, 184.

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LORD FITZGERALD:—

My Lords, the case has come before your Lordships in a somewhat unsatisfactory and irregular condition, but the admissions properly made by counsel in the Court below enable the House to dispose of the appeal on the merits without the necessity of determining some points of substantial technicality.

I do not propose now to consider the enactments and rules as to costs which preceded the present Order LXV., or to endeavour to ascertain why the concluding proviso was added to that order. There it is—the order has the force of a statute, and imposes on the judge a discretion which he is bound to exercise judicially for good cause when properly called on to do so.

Such an application was duly made to the learned Chief Justice at the close of the trial, and it is now clear that if the Chief Justice had exercised his jurisdiction his decision then would have been in favour of the defendants on the merits. If he had done so, and if it was practically open to the plaintiff to appeal, it seems clear that he could not have done so successfully.

The learned judge refused to exercise his undoubted jurisdiction in the matter for reasons which he then gave. He is represented to have thus expressed himself to the defendants' counsel:—"Although, if it rested with me, I should go with you, I shall decline; but I will tell you what you may do, because I very much want it to be settled. You are quite at liberty to go to the Court of Appeal and say I have refused to exercise any discretion at all. I do not refuse to accede to your application on the ground of exercising my discretion, but I decline to exercise a discretion in consequence of that case." The case referred to is *Jones* v. *Curling* (1). The defendants in the present case came to the Court of Appeal and an objection having been raised to the effect that the appeal did not lie to that Court, Bowen L.J. intervened, and an arrangement was entered into which must be interpreted as an agreement that the Court of Appeal should hear the appeal, and dispose of the case on the merits.

The Court heard the appeal and expressed its opinions at large, but thought wisely that the case ought to be taken again before the Lord Chief Justice and the application renewed for an order

(1) 13 Q. B. D. 262.

to deprive the plaintiff of costs, and if the Lord Chief Justice declined jurisdiction then the defendants were to be at liberty to go to the Divisional Court. No objection has been made to that order.

The parties acted on it and went again before the Lord Chief Justice. Upon a full hearing on the merits the Lord Chief Justice exercised the jurisdiction which he had previously declined, and in his discretion made an order depriving the plaintiff of his costs. The plaintiff appealed to the Court of Appeal, and that Court by its order dismissed that appeal.

As against that last order two grounds of appeal only are stated, namely: first, the Lord Chief Justice was functus officio, and had no jurisdiction to make the order; secondly, there was no good cause within the meaning of Order LXV. r. 1 for depriving the plaintiff of his costs of the action.

Upon the first point I should come to the conclusion, if it were necessary, that having regard to the arrangement entered into at the first hearing in the Court of Appeal, it was not open to the plaintiff. It was admitted in argument here that the lapse of time between the trial and the actual making of the order by the Lord Chief Justice was not in this case material, but it was urged that his power was exhausted by the occurrences which took place immediately after the trial and by the entry of judgment. It seems to me that this contention is not well founded. The Lord Chief Justice at the trial did not exercise the jurisdiction which he undoubtedly had, and was bound to exercise when properly called on to do so. He declined from difficulties which he supposed to exist, and left the defendants to apply to the Appellate Court.

As to the second ground of this appeal, I think the plaintiff equally fails, and for reasons which have been already given. The meaning of the objection is, that no fact, or state of facts, came before the Lord Chief Justice at the trial, which could constitute "good cause" within the meaning of Order LXV., and therefore that the Lord Chief Justice had no jurisdiction to make the order. If at liberty to examine the proposition, I should say that there was a state of facts brought before the Lord Chief Justice in the course of the trial amply sufficient to consti-

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tute "good cause" and give him jurisdiction to make an order (if in the exercise of his judicial discretion he thought fit) that the costs "should not follow the event." The judge is not absolutely bound to make such an order though the facts are sufficient to found his jurisdiction. He may still in the exercise of that jurisdiction and in his judicial discretion decline to make the order.

It may be expected that your Lordships should say something of *Jones* v. *Curling* (1), as it was the decision in that case which caused the difficulty of the Lord Chief Justice. The principle on which that case is supposed to rest seems to be, that if there are no facts before the judge which could constitute "good cause," then the judge has no jurisdiction to interfere, and his order would be erroneous. So far I can see no reason to dissent; I concur so far. But, my Lords, I do not feel called on to offer any opinion as to whether there were circumstances in that case which might constitute "good cause," and which the judge determined did amount to "good cause" for his interference; nor am I prepared to adopt the proposition that the Lord Chief Justice in making the order which he did make in that case assumed to have a jurisdiction without there being any facts which gave him that jurisdiction.

This appeal questions the jurisdiction of the judge and not the exercise of judicial discretion. I am of opinion that the facts in proof gave him jurisdiction.

LORD MACNAGHTEN:—

My Lords, I quite agree in the conclusions at which my noble and learned friends have arrived.

LORD WATSON:—

My Lords, Lord Herschell, who has been obliged to leave the House, has desired me to state that he concurs in the opinion which I delivered.

LORD HALSBURY L.C.:—

My Lords, since I addressed the House a letter has been placed in my hands coming from the plaintiff, in which he desires to be

(1) 13 Q. B. D. 262.

heard by himself. That letter seems to me to be founded upon the notion that the plaintiff can give additional facts to your Lordships, and can state matters which were not in proof at the trial, which he thinks will relieve him from the stigma which the Lord Chief Justice's decision places upon him. My Lords, I can only say that so far as the argument upon matter of law is concerned nothing is left to be desired—conspicuously after the argument of Mr. Bell—but as to matters of fact I think it is right to say in the presence of the plaintiff that your Lordships are unable to enter into any new questions of fact; we must take the facts proved at the trial, and therefore it would not be regular or proper to permit him again to enter into a statement of facts which could not be proved.

Order appealed from affirmed; and appeal dismissed.

Lords' Journals 18th March 1889.

Solicitor for appellant: *Robert Kent.*
Solicitor for respondents: *W. Heggerty*

J. C.* 1888 Nov. 8; Dec. 1.

THE "CITY OF PEKING" . . . . . DEFENDANTS;

AND

THE COMPAGNIE DES MESSAGERIES MARITIMES . . . . . PLAINTIFFS.

THE "CITY OF PEKING."

ON APPEAL FROM THE VICE-ADMIRALTY COURT AT HONG KONG.

Collision—Exceptional Current—Liability—Evidence of Negligence.

Where a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself primâ facie evidence of fault, although such steamer is well equipped, and both officers and men are shewn to have been at their posts and on the outlook.

Where collision under such circumstances was attributable to the effect of an exceptional current, known to be a possible though improbable contingency, but it was shewn that the port anchor of the steamer was not in readiness, and that delay arose in dropping the starboard anchor, *held*, that the steamer had neglected ordinary precautions and could not be absolved from blame.

APPEAL from an order of the Vice-Admiralty Court (June 10, 1887), finding that the *City of Peking* was solely to blame for a collision between that vessel and the *Saghalien*, which took place in the harbour of Hong Kong on the 29th of November, 1886, and condemning the *City of Peking* and the bail given on behalf of her owners, in damages the amount of which was thereby referred to the registrar and merchants.

The facts are stated in the judgment of their Lordships.

Sir *W. Phillimore*, Q.C., and *Walton*, for the appellants.

Barnes, Q.C., and *Raikes*, for the respondents.

1888 Dec. 1.

The judgment of their Lordships was delivered by

LORD WATSON:—

This is an appeal brought by the owners of the *City of Peking* against a judgment of the Vice-Admiralty Court of Hong Kong,

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN, and MR. STEPHEN WOULFE FLANAGAN.

condemning their ship and bail in the amount of damage occasioned to the steamship *Saghalien*, belonging to the Compagnie des Messageries Maritimes, and her cargo, by the collision of the two vessels, which occurred within the harbour of Hong Kong shortly after 2 P.M. on the 29th of November, 1886.

The northern fairway of the harbour, which is about two-fifths of a mile in breadth, runs westward from the south-western extremity of a promontory, jutting into the harbour from the north, which is known as Kowloon Point. At the time of the collision the *Saghalien* was lying opposite to Kowloon Point, her head being moored to a buoy on the southern side of the fairway, which left her free to swing with wind or tide. The *City of Peking*, which is a screw steamer of 5042 tons burthen, and 425 feet in length, entered the harbour from the east, against a half ebb tide, on her way to her own moorings, which are situated on the north edge of the fairway nearly a mile to the west of Kowloon Point.

It is not matter of dispute that, after she came within the limits of the harbour, the *City of Peking* was steered straight for the Meeanee buoy, which lay between her and the *Saghalien*, until she reached a point about three-fifths of a mile to the east of the latter vessel; and that appears to be the usual and proper course.

The account which is given, by her own witnesses, of the subsequent navigation of the *City of Peking*, from the point in question till the collision took place, is as follows. In ordinary circumstances, her helm at that point would have been ported, so as to bring her towards the centre of the fairway, and she would in that case, if she had continued to obey her helm, have passed the *Saghalien* at a considerable distance. But that course was obstructed by two large junks which were heading towards Kowloon Point. These junks were in reality anchored, but they were supposed to be under way, owing to the fact that their sails were set, and were filled by a light easterly wind, and that their hawsers were on their port side. In these circumstances the speed of the *City of Peking* was reduced from 10 to between 4½ and 5 knots an hour, and her helm was ported and steadied on a course nearer to the south side of the fairway, which if,

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maintained, would have carried her astern of the junks, and about 400 feet ahead of the *Saghalien*. When she was astern of the junks, and about 90 feet from them, but before she came abreast of the *Saghalien*, the witnesses for the *City of Peking* assert that her head was suddenly caught by a strong tidal current, running southwards from Kowloon Point at the rate of 4 to 5 knots an hour, which at once canted it round to port. The captain, who was himself in charge upon the forward bridge, then gave three consecutive orders, all of which were promptly obeyed. He first ordered the helm to be put hard-a-port, but that had no effect. At that moment his vessel was less than twice her own length from the *Saghalien*, and he at once saw that there was imminent danger of collision. In fact the two ships were so near to each other that, in his judgment, he could not have got clear of the *Saghalien* by going full speed ahead. He accordingly gave the order to stop and reverse, and at the same time directed the third officer to go to the chief engineer and tell him to back her as hard as possible. On the return of the third officer from that errand, but not till then, he gave the order to drop the starboard anchor, which was the only one ready to let go, the port anchor having been unshackled just before they came abreast of Kowloon Point. These proceedings failed to stop her way, and the stem of the *City of Peking* struck the *Saghalien*, which was then heading to the north, nearly amidships, causing damage both to hull and cargo.

The learned judge of the Vice-Admiralty Court came to the conclusion, upon the evidence, that the statements made by the witnesses of the *City of Peking* as to the alteration of her helm at the distance of three-fifths of a mile from the *Saghalien* are erroneous, and that she was actually steered throughout upon a course which necessarily brought her at right angles on the *Saghalien*. Except upon very clear testimony their Lordships would be unwilling to hold that a well-equipped vessel like the *City of Peking*, with her officers and crew at their posts and on the outlook, had deliberately run down a ship at anchor; but there appears to them to be no ground for that inference in the present case. The learned judge relied upon the evidence of Isuard and Delmas, the second captain and lieutenant of the

Saghalien, and that of Captain Paul, of the *Tanais*, who all state that, when they saw the *City of Peking*, she was bearing straight for the *Saghalien*. Had these witnesses observed the whole course of the *City of Peking*, their evidence would have been material; but having regard to the time at which their observations were made, it does not conflict with the evidence for the *City of Peking*. Only one of the three, Delmas, saw her at some distance off, when she fired a gun on entering the harbour, at which period of time she was admittedly steered for the Meeanee buoy, which was nearly in a line with the *Saghalien*. He then went about his own business, and saw no more of her, until her crew were preparing to let go the starboard anchor. Isuard no doubt says that he never lost sight of her, and that she never changed her course; but it clearly appears from his evidence that he did not see her at all, until just before she was observed for the second time by Delmas. Captain Paul's opportunities of observation were equally limited. He says "it was perhaps a minute from the time I first saw her till the collision."

Whilst their Lordships are prepared to acquit the *City of Peking* of having steered a straight course for the *Saghalien*, it does not necessarily follow that, in their opinion, she must be absolved of all blame in the matter. When a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself primâ facie evidence of fault; and she cannot escape liability for the consequences of her act, except by proving that a competent seaman could not have averted or mitigated the disaster by the exercise of ordinary care and skill.

The appellants attribute the collision wholly to the effect upon their vessel of the current which caught her head, to counteract which they maintain that every reasonable precaution was used which ordinary skill and prudence could suggest. It appears to be an undoubted fact that, in certain states of the weather, at half ebb, the tide setting eastwards sweeps down the western shore of the promontory of Kowloon, and is thereby deflected, and runs, with considerable force, in a southerly direction across the fairway. These currents are exceptional, but that they do occasionally, although at distant intervals, occur, is known to

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mariners who frequent the harbour, and was known to the captain of the *City of Peking*. The evidence on both sides establishes that it is impossible to lay down any rule in regard to the recurrence of these exceptional tides; they may occur at any time, even when least anticipated, and a cautious mariner is therefore bound always to keep in view the possibility of their being met with. There can be no reason to doubt the statement of the captain that he did not expect to meet with a current of the force of that which he encountered, but, however little expected, it was his duty to be prepared for such a contingency. The fact that he had been compelled, by the apparent position of the two junks, to keep to the southern edge of the fairway made that duty the more imperative. Their Lordships are not prepared to hold that, using all due precaution, he was not entitled to steer upon the course which he proposed to follow. The liability or non-liability of his ship appears to them to depend upon this consideration—whether, at the time when she was caught by the current, he was prepared to use, and did actually use, all ordinary and proper measures for averting the collision?

There is a serious conflict of testimony as to the actual force of the current at the time of the collision, some witnesses estimating it at half a knot, and others at nearly five knots, an hour. Their Lordships do not think it necessary to decide between these conflicting views, or to determine the precise strength of the current on the occasion in question. It appears to them that, assuming his statement on that point to be correct, the evidence nevertheless establishes that the captain of the *City of Peking* failed, in two particulars, to take proper steps for checking the way of his ship.

In the first place, their Lordships have been advised by their nautical assessors, and they have no hesitation in holding, that the starboard anchor ought to have been dropped at the same time when the order to stop and reverse was given. That an appreciable interval of time must have elapsed between the giving of the second and third orders is made clear by the evidence of the captain and third officer; and the second captain of the *Saghalien* is probably not far wrong in his estimate of distance, when he states that, at the time it was dropped, the two

vessels were not more than 200 feet apart. Seeing that 60 fathoms or 180 feet of chain were paid out with the anchor, there must have been very little time for it to operate before the collision occurred.

In the second place, their Lordships have been advised that, in the circumstances in which the *City of Peking* was placed, her port anchor ought also to have been in readiness, and ought to have been let go, so soon as the ship ceased to obey her helm in consequence of the current. In that opinion they entirely concur. In such circumstances, the keeping of both anchors in readiness is a safe and ordinary precaution, it being impossible to predict which of the two it may become necessary to drop, or that both will not be required. That a second anchor, if dropped in time along with the first, would have had a material influence in averting the collision, or minimising its effects, can hardly be questioned by the appellants, whose third officer states in his evidence, "I dare say two anchors would have held her." The fact seems to have been that those in charge of the *City of Peking*, although they ought to have been aware of the possibility, thought there was no probability of danger from a current; and, acting on that speculation, they allowed the port anchor to be unshackled before the junks were reached. In other words, they took their chance, and the ship must bear the consequences.

It is right to state that these views are in entire accordance with certain of the findings in the Court below. Their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The appellants must pay the costs of the appeal.

Solicitors for the appellants: *Trinders & Co.*

Solicitors for the respondents: *Gallatly & Warton.*

[PRIVY COUNCIL.]

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July 12, 13, 17, 19, 20, 24, 26; *Dec.* 12.

ST. CATHERINE'S MILLING AND LUMBER COMPANY . . . . . } DEFENDANTS;

AND

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR ONTARIO } PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *s.* 109—*Lands reserved to the Indians—Rights of the Province.*

Sect. 109 of the B. N. A. Act of 1867 gives to each Province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, subject to such rights as the Dominion can maintain under sects. 108 and 117.

Attorney-General of Ontario v. *Mercer* (8 App. Cas. 767) followed.

By royal proclamation in 1763 possession was granted to certain Indian tribes of such lands, "parts of our dominions and territories," as, not having been ceded to or purchased by the Crown, were reserved, "for the present," to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the governor of the colony in which the lands lie, and not by any private person.

In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until that date under the said proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the Government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing:—

Held, that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Crown; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was "an interest other than that of the Province in the same," within the meaning of sect. 109.

Held also, that by force of the said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the Province in terms of sect. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein.

APPEAL from a judgment of the Supreme Court, dated June 20, 1887 (Ritchie, C.J., Fournier, Henry, and Taschereau, JJ.,

Present:—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR RICHARD COUCH.

Strong and Gwynne, JJ., dissenting), which affirmed a judgment of the Chancery Division of the High Court of Justice for Ontario (June 10, 1885).

The question in the appeal was whether certain lands admittedly situated within the boundaries of Ontario belonged to that Province or to the Dominion of Canada. The appellants cut timber on the lands, which are Crown lands, without authority from the Ontario Government, which accordingly sued for an injunction and damages. The appellants justified by setting up a licence from the Dominion Government dated 1st of May, 1883. The Courts in Canada decided in favour of the Province. The order of Her Majesty in Council granting special leave to appeal provided that the Dominion should be at liberty to intervene in the appeal.

The circumstances out of which the dispute as to title arose are set out in the judgment of their Lordships.

Sir *R. E. Webster*, A.G., and *Gore*, for the Attorney-General for the Dominion.

McCarthy, Q.C. (Canada), and *Jeune*, Q.C., for the appellants.

Mowat, Q.C. (*Attorney-General for Ontario*), and *Blake*, Q.C. (Sir *Horace Davey*, Q.C., and *Haldane*, with them), for the respondents.

Sir *R. E. Webster*, A.G., and *McCarthy*, Q.C., contended that the judgment of the Supreme Court should be reversed. It lay on the respondent to make good the title of the Province to these lands. Previous to the treaty of the 3rd of October, 1873, the lands in suit, and the whole area of which they formed part, were occupied by a tribe of the Ojibbeway Indians, who by that treaty ceded the whole area in manner as therein mentioned to the Government of the Dominion. The provincial Government were no party to this treaty, and it was admitted that no surrender had been made of Indian title except to the Dominion. Reference was made to the British North America Act, 1867, sect. 91, sub-sect. 24, which gives to the Dominion exclusive legislative authority over "Indians and lands reserved for the Indians" as compared with sect. 92, sub-sect. 5, which assigns "the manage-

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ment and sale of public lands belonging to the Province, and of the timber and wood thereon" to the legislative authority of the Province. Also to sects. 109 and 117, and to *Attorney-General of Ontario* v. *Mercer* (1).

Documentary evidence was referred to, to shew the nature and character of the Indian title. It was contended that the effect of it was to shew that from the earliest times the Indians had, and were always recognised as having, a complete proprietary interest, limited by an imperfect power of alienation. British and Canadian legislation was referred to, to shew that such complete title had been uniformly recognised: see Royal Proclamation October 7, 1763, held by Lord Mansfield in *Campbell* v. *Hall* (2) to have the same force as a statute, under which the lands in suit were reserved to the Indians in absolute proprietary right; 43 Geo. 3, c. 138; 1 & 2 Geo. 4, c. 66; 17 Geo. 3, c. 7 (Quebec); 10 Geo. 4, c. 3 (Upper Canada); 7 Will. 4, c. 118; 2 Vict. c. 15, and 12 Vict. c. 9 (Upper Canada); 13 & 14 Vict. c. 74 (U. C.); 14 & 15 Vict. c. 51 (U. C.); 16 Vict. c. 91 (U. C.); 20 Vict. c. 26 (U. C.). The proclamation in 1763 was uniformly acted on and recognised by the Government as well as the legislature, and was regarded by the Indians as their charter. It was not superseded by the Quebec Act (14 Geo. 3, c. 83, imperial statute); but it was held by the Supreme Court of the United States to be still in force in 1823: see *Johnson* v. *McIntosh* (3). Reference was also made to *The Cherokee Nation* v. *The State of Georgia* (4) and *Worcester* v. *The State of Georgia* (5); *United States* v. *Clarke* (6); *Mitchel* v. *United States* (7); *The State of Georgia* v. *Canatoo*, reported in a note to Kent's Commentaries, vol. iii., p. 378; *Ogden* v. *Lee* (8); *Fellows* v. *Lee* (9); *Gaines* v. *Nicholson* (10); Chitty's Prerog. of the Crown, p. 29. Reference was also made to the case of *The Queen* v. *Symonds* (June, 1847), in Parliamentary Papers, 1860, vol. xlvii., p. 47 (Colonies New Zealand), where also there was said to be a report of a Select Committee of the House of Commons on the Treatment of the

(1) 8 App. Cas. 767.
(2) 1 Cowp. 204.
(3) 8 Wheaton, 543.
(4) 5 Peters, 1.
(5) 6 Peters, 515.
(6) 9 Peters, 168.
(7) 9 Peters, 711.
(8) 6 Hills, 546.
(9) 5 Denio, 628.
(10) 9 Howard, 356.

Aborigines in British Settlements. Also to a report in Appendix I. to Journals, House of Assembly, Canada, 1847, headed "Title to Lands and Tenure of Land."

The absolute title being in the Indians was ceded by them, subject to certain reservations, for valuable consideration to the Dominion, and the treaty to that effect did not enure to the benefit of the Province in any way. The Province could not claim property in the land except by virtue of the Act of 1867, and as regards that Act the lands did not belong to the Province prior thereto within sect. 109; they were not in 1867 public property which the Province could retain under sect. 117; they were not public lands of the Province within sect. 92, sub-sect. 5.

Mowat, Q.C., and *Blake*, Q.C., for the respondent, contended that both before and after the treaty of 1873 the title to the lands in suit was in the Crown and not in the Indians. The lands being within the limits of the Province, the beneficial interest therein passed to the Province under the Act of 1867, and the Dominion obtained thereunder no such interest as it claims in this suit. Even if they were lands reserved for the Indians within the meaning of the Act the Dominion gained thereunder only a power of legislating in respect to them, it did not gain ownership or a right to become owner by purchase from the Indians. Under sect. 109, whether reserved to the Indians or not the land goes to the Province subject to any interest on the part of the Indians. See also sect. 108 and sect. 91, sub-sect. 9. With regard to the alleged absolute title of the Indians to which the Dominion is said to have succeeded by treaty, no such title existed on their part either as against the King of France before the conquest or against the Crown of England since the conquest. Their title was in the nature of a personal right of occupation during the pleasure of the Crown, and it was not a legal or an equitable title in the ordinary sense. For instance, the Crown made grants of land in every part of British North America both before and after the proclamation of 1763 without any previous extinguishment of the Indian claim. The grantees in those cases had to deal with the Indian claims, but the legal validity of the grants themselves was undeniably recognised both in the Canadian and

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the American Courts. As regards that proclamation it was argued that it was not intended to divest, and did not divest, the Crown of its absolute title to the lands, and the reservation, upon which so much argument has been rested, was expressed to last only "for the present and until Our further pleasure be known." Further, as regards the lands now in suit the proclamation was superseded by the Imperial Act of 1774, known as the Quebec Act, which added that land to the Province. It was not the intention of that Act to give to the Indians any new right over and above the interest which they possessed under the proclamation, and which was a mere licence terminable at the will of the Crown. With regard to the effect of purchases from the Indians, reference was made to *Meigs* v. *McClung's Lessee* (1) and *Clark* v. *Smith* (2).

With regard to the application of the British North American Act and the construction to be placed upon it, it was submitted that that Act should be on all occasions interpreted in a large, liberal, and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words. The general scheme, purpose, and intent of the Act should be borne in mind. The scheme is to create a federal union consisting of several entities. The purpose was at the same time to preserve the Provinces, not as fractions of a unit, but as units of a multiple. The Provinces are to be on an equal footing. The ownership and development of Crown lands and the revenues therefrom are to be left to the Province in which they are situated. As to legislative powers, it is the residuum which is left to the Dominion; as to proprietary rights, the residuum goes to the Provinces. Where property is intended to go to the Dominion it is specifically granted, even though legislative authority over it may already have been vested in the Dominion. It is contrary to the spirit of the Act to hold that the grant of legislative power over lands reserved for the Indians carries with it by implication a grant of proprietary right.

Sir *R. E. Webster*, A.G., replied:—

Upon the question whether the old province of Canada had any right to the lands in suit at the date of the Act of 1867 which

(1) 9 Cranch, 11 (2) 13 Peters, 195.

passed thereunder, certain legislative duties had been conferred on the province with regard to Indians, and a certain power of bargaining with regard to Indian lands; but no proprietary right had been given: see 2 Vict. c. 15 (U.C.), which was held to apply to unsurrendered lands in *The Queen* v. *Strong* (1), and *Little* v. *Keating* (2). There is a series of statutes which shews that prior to 1867 the Province had nothing but some slight legislative rights over the land: see 3 & 4 Vict. c. 35, s. 54; 12 Vict. c. 9; 13 & 14 Vict. c. 74; Cons. Stat. 22 Vict. (U.C.) c. 81; 23 Vict. c. 61, s. 54. The whole course of legislation before 1867 was that the proceeds of the Indian lands should be kept for the Indians, and not go to the Province. [LORD SELBORNE:—This is the first suggestion to that effect.] Reference was then made to the later Dominion Acts, 31 Vict. c. 42, ss. 6, 7, 8, 10, 11, especially 25; 39 Vict. c. 18; 43 Vict. c. 28. The Crown lands were dealt with by 23 Vict. c. 2; the Indian lands by 23 Vict. c. 151. Reference was made to *Vanvleck* v. *Stewart* (3); *Fegan* v. *McLean* (4), as shewing that the Indians had the right to cut and sell timber in the special reserves, and appropriate the proceeds.

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The judgment of their Lordships was delivered by

LORD WATSON:—

On the 3rd of October, 1873, a formal treaty or contract was concluded between commissioners appointed by the Government of the Dominion of Canada, on behalf of Her Majesty the Queen, of the one part, and a number of chiefs and headmen duly chosen to represent the Salteaux tribe of Ojibbeway Indians, of the other part, by which the latter, for certain considerations, released and surrendered to the Government of the Dominion, for Her Majesty and her successors, the whole right and title of the Indian inhabitants whom they represented, to a tract of country upwards of 50,000 square miles in extent. By an article of the treaty it is stipulated that, subject to such regulations as may be made by the Dominion Government, the Indians are to have right to pursue their avocations of hunting and fishing through-

(1) Upp. Can. Rep. 1 Ch. 392.
(2) 6 Upp. Can. Rep. Q. B (O.S.) 265.
(3) 19 Upp. Can. Rep. Q. B. 489.
(4) 29 Upp. Can. Rep. Q. B. 202.

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out the surrendered territory, with the exception of those portions of it which may, from time to time, be required or taken up for settlement, mining, lumbering, or other purposes.

Of the territory thus ceded to the Crown, an area of not less than 32,000 square miles is situated within the boundaries of the Province of Ontario; and, with respect to that area, a controversy has arisen between the Dominion and Ontario, each of them maintaining that the legal effect of extinguishing the Indian title has been to transmit to itself the entire beneficial interest of the lands, as now vested in the Crown, freed from incumbrance of any kind, save the qualified privilege of hunting and fishing mentioned in the treaty.

Acting on the assumption that the beneficial interest in these lands had passed to the Dominion Government, their Crown Timber Agent, on the 1st of May, 1883, issued to the appellants, the St. Catherine's Milling and Lumber Company, a permit to cut and carry away one million feet of lumber from a specified portion of the disputed area. The appellants having availed themselves of that licence, a writ was filed against them in the Chancery Division of the High Court of Ontario, at the instance of the Queen on the information of the Attorney-General of the Province, praying—(1) a declaration that the appellants have no rights in respect of the timber cut by them upon the lands specified in their permit; (2) an injunction restraining them from trespassing on the premises and from cutting any timber thereon; (3) an injunction against the removal of timber already cut; and (4) decree for the damage occasioned by their wrongful acts. The Chancellor of Ontario, on the 10th of June, 1885, decerned with costs against the appellants, in terms of the first three of these conclusions, and referred the amount of damage to the Master in Ordinary. The judgment of the learned Chancellor was unanimously affirmed on the 20th of April, 1886, by the Court of Appeal for Ontario, and an appeal taken from their decision to the Supreme Court of Canada was dismissed on the 20th of June, 1887, by a majority of four of the six judges constituting the court.

Although the present case relates exclusively to the right of the Government of Canada to dispose of the timber in question

to the appellant company, yet its decision necessarily involves the determination of the larger question between that government and the province of Ontario with respect to the legal consequences of the treaty of 1873. In these circumstances, Her Majesty, by the same order which gave the appellants leave to bring the judgment of the Court below under the review of this Board, was pleased to direct that the Government of the Dominion of Canada should be at liberty to intervene in this appeal, or to argue the same upon a special case raising the legal question in dispute. The Dominion Government elected to take the first of these courses, and their Lordships have had the advantage of hearing from their counsel an able and exhaustive argument in support of their claim to that part of the ceded territory which lies within the provincial boundaries of Ontario.

The capture of Quebec in 1759, and the capitulation of Montreal in 1760, were followed in 1763 by the cession to Great Britain of Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any previous time been held or acquired by the Crown of France. A royal proclamation was issued on the 7th of October, 1763, shortly after the date of the Treaty of Paris, by which His Majesty King George erected four distinct and separate Governments, styled respectively, Quebec, East Florida, West Florida, and Grenada, specific boundaries being assigned to each of them. Upon the narrative that it was just and reasonable that the several nations and tribes of Indians who lived under British protection should not be molested or disturbed in the "possession of such parts of Our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds," it is declared that no governor or commander-in-chief in any of the new colonies of Quebec, East Florida, or West Florida, do presume on any pretence to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments, or "until Our further pleasure be known," upon any lands whatever which, not having been ceded or purchased as aforesaid, are reserved to the said Indians or any of them. It was further declared "to be Our Royal will, for the present, as aforesaid, to reserve under Our

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sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of Our said three new Governments, or within the limits of the territory granted to the Hudson's Bay Company." The proclamation also enacts that no private person shall make any purchase from the Indians of lands reserved to them within those colonies where settlement was permitted, and that all purchases must be on behalf of the Crown, in a public assembly of the Indians, by the governor or commander-in-chief of the colony in which the lands lie.

The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, 1867), by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and

pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

By an Imperial statute passed in the year 1840 (3 & 4 Vict. c. 35), the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the Province of Canada, and it was, inter alia, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united Provinces should be paid into the consolidated fund of the new Province. There was no transfer to the Province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the Province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the Province, the title still remaining in the Crown. That continued to be the right of the Province until the passing of the British North America Act, 1867. Had the Indian inhabitants of the area in question released their interest in it to the Crown at any time between 1840 and the date of that Act, it does not seem to admit of doubt, and it was not disputed by the learned counsel for the Dominion, that all revenues derived from its being taken up for settlement, mining, lumbering, and other purposes would have been the property of the Province of Canada. The case maintained for the appellants is that the Act of 1867 transferred to the Dominion all interest in Indian lands which previously belonged to the Province.

The Act of 1867, which created the Federal Government,

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repealed the Act of 1840, and restored the Upper and Lower Canadas to the condition of separate Provinces, under the titles of Ontario and Quebec, due provision being made (sect. 142) for the division between them of the property and assets of the United Province, with the exception of certain items specified in the fourth schedule, which are still held by them jointly. The Act also contains careful provisions for the distribution of legislative powers and of revenues and assets between the respective Provinces included in the Union, on the one hand, and the Dominion, on the other. The conflicting claims to the ceded territory maintained by the Dominion and the Province of Ontario are wholly dependent upon these statutory provisions. In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

Sect. 108 enacts that the public works and undertakings enumerated in Schedule 3 shall be the property of Canada. As specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the Provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for the purpose of national defence, and of "lands set apart for general public purposes." It is obvious that the enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use The only other clause in the Act by which a share of what previously constituted provincial revenues and assets is directly assigned to the Dominion is sect. 102. It enacts that all "duties and revenues" over which the respective legislatures of the United Provinces had and have power of appropriation, "except such portions thereof as are by this Act reserved to the respective legislatures of the Provinces, or are raised by them in accordance with the special powers conferred upon them by this Act," shall form one consolidated fund, to be appropriated for the public service of Canada. The extent to

which duties and revenues arising within the limits of Ontario, and over which the legislature of the old Province of Canada possessed the power of appropriation before the passing of the Act, have been transferred to the Dominion by this clause, can only be ascertained by reference to the two exceptions which it makes in favour of the new provincial legislatures.

The second of these exceptions has really no bearing on the present case, because it comprises nothing beyond the revenues which provincial legislatures are empowered to raise by means of direct taxation for Provincial purposes, in terms of sect. 92 (2). The first of them, which appears to comprehend the whole sources of revenue reserved to the provinces by sect. 109, is of material consequence. Sect 109 provides that "all lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." In connection with this clause it may be observed that, by sect. 117, it is declared that the Provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. A different form of expression is used to define the subject-matter of the first exception, and the property which is directly appropriated to the Provinces; but it hardly admits of doubt that the interests in land, mines, minerals, and royalties, which by sect. 109 are declared to belong to the Provinces, include, if they are not identical with, the "duties and revenues" first excepted in sect 102.

The enactments of sect. 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under

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sect. 108, or might assume for the purposes specified in sect. 117. Its legal effect is to exclude from the "duties and revenues" appropriated to the Dominion, all the ordinary territorial revenues of the Crown arising within the Provinces. That construction of the statute was accepted by this Board in deciding *Attorney-General of Ontario* v. *Mercer* (1), where the controversy related to land granted in fee simple to a subject before 1867, which became escheat to the Crown in the year 1871. The Lord Chancellor (Earl Selborne) in delivering judgment in that case, said (2): "It was not disputed, in the argument for the Dominion at the bar, that all territorial revenues arising within each Province from 'lands' (in which term must be comprehended all estates in land), which at the time of the union belonged to the Crown, were reserved to the respective Provinces by sect. 109; and it was admitted that no distinction could, in that respect, be made between lands then ungranted, and lands which had previously reverted to the Crown by escheat. But it was insisted that a line was drawn at the date of the union, and that the words were not sufficient to reserve any lands afterwards escheated which at the time of the union were in private hands, and did not then belong to the Crown. Their Lordships indicated an opinion to the effect that the escheat would not, in the special circumstances of that case, have passed to the Province as "lands;" but they held that it fell within the class of rights reserved to the Provinces as "royalties" by sect. 109.

Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario* v. *Mercer* (1) might have been an authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must now belong to Ontario in terms

(1) 8 App. Cas. 767. (2) 8 App. Cas. 776.

of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

In the course of the argument the claim of the Dominion to the ceded territory was rested upon the provisions of sect. 91 (24), which in express terms confer upon the Parliament of Canada power to make laws for "Indians, and lands reserved for the Indians." It was urged that the exclusive power of legislation and administration carried with it, by necessary implication, any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning, counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in sect. 91 (24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

Their Lordships are, however, unable to assent to the argument for the Dominion founded on sect. 92 (24). There can be no à priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

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By the treaty of 1873 the Indian inhabitants ceded and released the territory in dispute, in order that it might be opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit, "to the Government of the Dominion of Canada," for the Queen and Her successors for ever. It was argued that a cession in these terms was in effect a conveyance to the Dominion Government of the whole rights of the Indians, with consent of the Crown. That is not the natural import of the language of the treaty, which purports to be from beginning to end a transaction between the Indians and the Crown; and the surrender is in substance made to the Crown. Even if its language had been more favourable to the argument of the Dominion upon this point, it is abundantly clear that the commissioners who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario the interest which had been assigned to that province by the Imperial Statute of 1867.

These considerations appear to their Lordships to be sufficient for the disposal of this appeal. The treaty leaves the Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown, all revenues derivable from the sale of such portions of it as are situate within the boundaries of Ontario being the property of that Province. The fact, that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario. Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown, and the Dominion, of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government. There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing, is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit.

Their Lordships will therefore humbly advise Her Majesty

that the judgment of the Supreme Court of Canada ought to be affirmed, and the appeal dismissed. It appears to them that there ought to be no costs of the appeal.

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Solicitors for appellants: *Johnston, Harrison, & Powell.*

Solicitors for Attorney-General for Ontario: *Freshfields & Williams.*

Solicitors for Attorney-General for the Dominion: *Bompas, Bischoff, Dodgson, & Coxe.*

[PRIVY COUNCIL.]

PLOMLEY AND OTHERS . . . . . APPELLANTS;

AND

FELTON AND OTHERS . . . . . RESPONDENTS.

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Nov. 28; *Dec.* 5.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Mortgage—Proviso of Redemption—Construction—Reconveyance to be of Original Estates of Mortgagors.

Where in a deed of mortgage it was recited that the mortgagor was entitled under his father's will to a life estate in the hereditaments comprised in the said deed, with remainder to his children as tenants in tail general, with cross-remainders between them, and that for the purpose of increasing the mortgagee's security one of his daughters and her husband (parties thereto of the second part) had agreed to bar the estate tail in remainder vested in them, the reconveyance to be made to the mortgagors respectively according to their original respective estates and interests therein:—

Held, that, according to the true construction of the proviso for redemption, the parties were entitled to a re-conveyance of the estates as originally created by the will, and not as altered for the purposes of the mortgage.

APPEAL from an order of the Supreme Court (July 25, 1887), confirming an order of the Primary Judge in Equity (Nov. 16, 1885).

There were two questions in this appeal. One was whether a deed of mortgage, dated the 28th of February, 1859, and sufficiently set out in their Lordships' judgment, by which a tenant

* *Present:*—LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN, SIR RICHARD COUCH, and MR. STEPHEN WOULFE FLANAGAN.

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in tail barred her estate tail, was effectual to extinguish the entail altogether, or only for the purposes of the mortgage. The other was whether a certain Act of the Colonial Legislature, called Underwood's Estate Act of 1873, effected a conversion of the lands comprised in it into personalty.

James Underwood was the testator in the cause, and devised certain estates to trustees named in his will in trust for Thomas Underwood for life, with remainder to his children as tenants in common in tail, with cross-remainders between them in tail.

Thomas Underwood had seven children, including the respondent James Joseph Underwood, who barred his estate tail in the lands devised, and the respondent Catherine, who married Percy Felton. Percy and Catherine in 1883 conveyed all their estate in the devised lands, freed from Catherine's estate tail therein, to the respondents Underwood and Wilkinson as trustees. The three Lissons, respondents, were infant children of Jane, one of Thomas Underwood's children. The other children of Thomas Underwood, including Maria Macdonell, died. All died without issue, and all, except Maria, without having barred the estate tail. The appellants were assignees of Thomas Underwood's life estate under the will, and also of such estate and interest (if any) in the lands devised as he derived by inheritance from his daughter Maria.

Pursuant to the Underwood's Estate Acts the whole of the lands devised to Thomas Underwood for life were sold, and the proceeds paid into Court.

The petition out of which this appeal arose was presented by the respondents, praying for payment out of Court of their shares of the fund. It was referred to the Master to report who were entitled, and in what proportion, and for what estates and interests, in the fund. His report certified the facts, but did not report as to title, owing to the complex points of law arising from the contention of the parties.

Those contentions, so far as material, were as follows:

The appellants contended that by the mortgage of the 28th of February, 1859, Maria Macdonell barred all her estates tail in the properties included in the mortgage, both those immediately expectant on the life estate of Thomas Underwood and those

which she took by way of remainder in the shares limited in tail to the other children of Thomas Underwood, and all remainders and interests to arise after or in defeazance of such estates tail respectively, and that (subject to the mortgage) she became seised thereof for an estate of inheritance in fee simple, and that upon her death without issue such estate passed to her father Thomas Underwood, as her heir-at-law, and to his assigns, and they claimed accordingly.

On the other hand, the respondents contended that the estates tail of Maria Macdonell were by the mortgage barred only for the purposes of that security and not further or otherwise, and that upon her death without issue her interest in the properties comprised therein passed (subject to the mortgage) under the will of James Underwood, and was vested as to one-third share in the respondents James Joseph Underwood and Charles David Wilkinson as such trustees as aforesaid, as to one other third share thereof in the respondent James Joseph Underwood, and as to the other third share thereof in the persons entitled to the interest of Jane Lisson deceased.

The Primary Judge decided on consideration of the report against the appellants' contention. The Full Court confirmed that decision.

Sir *Horace Davey*, Q.C., and *Elton*, Q.C. (*Challis*, with them), for the appellants, contended that upon the true construction of the mortgage deed it took effect to bar all estates tail in any part of the property to which Maria Macdonell was entitled. It also barred all remainders in tail in expectancy thereupon limited by or capable of arising under James Underwood's will, and also all the ultimate reversion in fee simple upon all such estates for all purposes. It was not intended by the deed merely to bar the entail for the purposes of the deed. It was not intended that upon redemption of the mortgage the barred estates should revive and be reconveyed to the mortgagors in a different form from that in which they had been granted by them. The deed had been duly executed and acknowledged by Maria Macdonell according to sect. 16 of Act 7 Vict. No. 16. The bar was complete, and none of the persons entitled in remainder or reversion expectant

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upon Maria Macdonell's estates tail had any claim or interest under the equity of redemption or proviso for reconveyance contained in the deed. Reference was made to *Doe* v. *Rolfe* (1); *Tanner* v. *Radford* (2); *Reeve* v. *Hicks* (3). The strongest case on the other side is *Whitbread* v. *Smith* (4). But see *Anson* v. *Lee* (5). [LORD MACNAGHTEN:—That case is questioned in Sugden on Powers (6)]. *Atkinson* v. *Smith* (7), the effect of which is stated in Fisher on Mortgages (3rd ed.) sect. 1220. The remaindermen were no parties to the mortgage, and could not be heard to say that the bar thereby effected was limited only to the uses of the mortgage: *Jackson* v. *Innes* (8); *Wood* v. *Wood* (9); *Hipkin* v. *Wilson* (10); Preston on Conveyancing, vol. i. pp. 316, 317; Comyns' Digest, Uses, D 2, vol. vii., p. 573; *Martin* v. *Strachan* (11); *Lord Lilford* v. *Attorney-General* (12); *Stapilton* v. *Stapilton* (13); *Jackson* v. *Parker* (14). Upon the second point they contended that upon the true construction of "Underwood's Estate Act of 1873," and of its amending Act of 1874, the former Act operated to effect an immediate conversion in equity into personal estate of all real estate devised by the will. The result was that from the date of the Act the real estate devised by the will became liable to be treated as personalty. Reference was made to *Julius* v. *Bishop of Oxford* (15) as to the effect of "it shall be lawful," which phrase occurred frequently in the Act: and as to conversion to *Arnold* v. *Dixon* (16); *Hyett* v. *Mekin* (17); *Walker* v. *Shore* (18); *In re Lord Chesterfield's Trusts* (19).

Rigby, Q.C., and *Clare*, for the respondents Feltons, Underwood, and Wilkinson, the petitioners in the Court below.

Serrell, for the infant John Lisson.

(1) 8 Ad. & El. 650.
(2) 6 Sim. 21.
(3) 2 S. & S. 403.
(4) 3 De G. M. & G. 727.
(5) 4 Sim. 364, 378, 379.
(6) See 7th Ed. vol. i. p. 347.
(7) 3 De G. & J. 186.
(8) 1 Bli. 104.
(9) 7 Beav. 183.
(10) 3 De G. & Sm. 738.
(11) 5 T. R. p. 107, n.
(12) Law Rep. 2 H. L. 63, 68, 70.
(13) 1 Atk. 9.
(14) 2 Amb. 687.
(15) 5 App. Cas. 214.
(16) Law Rep. 19 Eq. 113.
(17) 25 Ch. D. 735.
(18) 19 Ves. 387.
(19) 24 Ch. D. 642.

Lemon, for the infants Lisson.

The counsel for the respondents were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

Their Lordships understand that there is, or may be, a question with regard to costs on which they will hear the parties if they desire to say anything when judgment has been given.

On the merits their Lordships do not think it necessary to call upon you, Mr. Rigby.

The case has been argued very elaborately, but it lies in a narrow compass.

The real question depends on the true construction and effect of one instrument—a deed of mortgage in which Maria Macdonell, a married woman, joined, for the purpose of securing a debt of her father by vesting in the mortgagee the inheritance, in fee simple, in certain property of which her father was tenant for life. In the Supreme Court it was held that the operation of the deed was practically confined to that purpose. The learned counsel for the appellant maintained that it had a further purpose, or at any rate a further operation. They contended that the estates and limitations which were barred and destroyed in order to give effect to the mortgage were not revived or restored in the equity of redemption, and they argued that in coming to a different conclusion the learned judges of the Supreme Court misconceived or misapplied the authorities to which they referred.

Their Lordships think that, in a case like the present, very little assistance is to be derived from reported decisions. Sometimes it has been said that where there is a mortgage there is a presumption against any alteration being intended in the title to the equity of redemption. But then the strength or weakness of that presumption must depend upon the particular circumstances of the case; and the question remains, Is the deed to be regarded as a mere mortgage, a mere charge; or is it a mortgage, and a new settlement, or new disposition combined? It has also been said that slight and trivial alterations in the reservation of

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the equity of redemption are not sufficient to shew an intention to alter pre-existing limitations. But that is little better than a truism. If the alterations are really slight and trivial, it certainly would be unreasonable to attach any importance to them. Again, it cannot be disputed that cases where a wife's estate is mortgaged to secure the debt of her husband stand in a peculiar position. And then special considerations are suggested where the doctrines of equity relating to the execution of powers are applicable.

In the result their Lordships think that the only safe rule, the only rule of any practical value, to be deduced from the authorities is this: that each case must depend on its particular circumstances; that in each case the intention must be collected from the instrument which has given rise to the question; and that that instrument must be interpreted according to the ordinary rules of interpretation.

The deed of mortgage in the present case was duly executed by Mrs. Macdonell in accordance with the requirements of sect. 16 of the Registration Act, 7 Vict., No. 16, which enables married women to dispose of real estate, whether held in fee or in tail, but which does not contain provisions corresponding with those in sect. 21 of the Fines and Recoveries Act, a section introduced into the English Act, as Lord St. Leonards observes, for the purpose of putting an end to such questions as arose in *Jackson* v. *Innes* (1).

The deed of mortgage is dated the 28th of February, 1859. It was made between Thomas Underwood, the father, of the first part; Randall Macdonell, described as a schoolmaster, and Maria, his wife, formerly Maria Underwood, spinster, daughter of Thomas Underwood, of the second part, and John Savery Rodd the mortgagee of the third part. It recites that Thomas Underwood was under and by virtue of the will of his father possessed of an estate for his own life in the whole of the hereditaments described in the first schedule, and in one fifth of the hereditaments described in the second schedule, and that the remainder dependent upon the life estate of the said Thomas Underwood was, by virtue of the said will, vested in the children of Thomas

(1) Sug. Real Prop. Stat. p. 200.

Underwood as tenants in common in tail general. It then states that Thomas Underwood had seven children, all of whom were infants except Maria Macdonell, who had just attained the age of twenty-one. It recites a previous mortgage by Thomas Underwood for £800, and states that he required a further advance of £500, making altogether £1300; and that he proposed to secure that sum by adding to the security already held by the mortgagee certain parcels of land described in the third schedule, "and by inducing the said Randal Macdonell and Maria, his wife, to bar the estate tail in remainder vested in her and in him, in her right, in the lands and hereditaments comprised in the first and second schedules hereto, and to convey the same to the said John Savery Rodd in the manner hereby intended to be effected." Then follows this recital:—"And whereas the said Randall Macdonell, and Maria his wife, have agreed to join in these presents for the purposes aforesaid." Now, perhaps it would be going too far to say that that recital confines the operation of the deed to its declared purposes. But certainly it shews no indication of any ulterior purpose. The deed then conveys the property to the mortgagee in fee. And the equity of redemption is limited in these terms:—if the money is paid, then the deed declares that "the said mortgagee will at the request and costs of the mortgagors, reconvey the said hereditaments unto the said mortgagors respectively, or as they shall respectively appoint, according to their original respective estates and interest therein." The expression "mortgagors" had been defined in an earlier part of the deed to mean Thomas Underwood and Randall Macdonell. Whether the property be reconveyed to them or to their nominees the original estates are to be restored.

Now what is the meaning of the expression "original" as applied to the estates referred to? The learned counsel for the appellants while admitting, as they were compelled to admit, that Thomas Underwood's original estate was the estate which he took under the will, contended that Mrs. Macdonell's original estate was the estate enlarged by the conveyance in the mortgage—the estate which owed its form, and in a sense owed its existence, to the mortgage deed itself. Their Lordships think that that would be an unnatural meaning to attach to the language used. They

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also think that it would be too narrow a construction to hold that the only estate intended to be restored was Mrs. Macdonell's immediate estate tail. They think the proviso for redemption refers back to the will as the origin of the title, and necessarily brings in the whole series of limitations contained in the will, including the reciprocal limitations between the beneficiaries as tenants in common in tail inter se, which are commonly known as cross-remainders.

There was one argument advanced by the learned counsel for the appellants which deserves notice. They said that according to their construction, Mrs. Macdonell was not parting with any portion of her estate; she was merely taking a more beneficial interest in her own estate; and they claimed to be the champions of Mrs. Macdonell's rights. At first sight that argument appears to be plausible; and it would have had very great weight if the estate had been limited in such a manner that Mrs. Macdonell could have dealt with it by will, or disposed of it without the cumbrous formalities which the statute has provided for the protection of married women. But the equity of redemption was not limited to Mrs. Macdonell's separate use. So long as the marriage existed, apparently it would have been necessary for Mrs. Macdonell to have gone through all these formalities again if she had desired to dispose of the estate in favour of her husband or anybody else.

Their Lordships think that it is unnecessary to refer to the terms of the power of sale. It was not contended that the language of the power of sale could control the meaning of the proviso for redemption if the proviso for redemption is clear.

Their Lordships therefore agree with the learned judges of the Supreme Court as to the effect of this deed.

On the second point it is only necessary to say a very few words. That branch of the argument was scarcely pressed seriously. On this point also they agree with the Supreme Court The Underwood Estate Act was not apparently intended to alter the rights of the beneficiaries under Mr. Underwood's will. It supplies machinery wanting in the will. But it does not in their Lordships' opinion effect an immediate or imperative conversion of the estate.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal and affirm the judgment of the Supreme Court.

Counsel for all parties having addressed their Lordships on the question of costs, counsel were directed to withdraw, and their Lordships deliberated.

Counsel having been re-admitted :—

LORD MACNAGHTEN :—

The appeal will be dismissed with costs, but there will be only one set of costs allowed to the respondents, and there will be no costs of John Lisson's application to appoint a guardian ad litem.

Solicitors for appellants: *G. L. P. Eyre & Co.*

Solicitors for respondents: *Burton, Yeates, Hart & Burton*; and *P. J. Gordon & Son.*

[PRIVY COUNCIL.]

J. C.* 1888 July 18, 25; Dec 1.

FALLE . . . . . DEFENDANT;

AND

GODFRAY . . . . . PLAINTIFF.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Law of Jersey—Valid Codicil to a Void Will—Competency of Witness.

The laws of Jersey are derived from those of Normandy, where the Roman law, including that respecting codicils following the condition of the testament, and being void where the latter is annulled, did not prevail.

Where a will was held by the law of Jersey to be null and void by reason of incompetent attestation:—

Held, that a validly executed codicil did not fall with the will, and that the residue disposed of by the codicil included all the legacies given by the will.

A witness to a will, incompetent by reason of relationship to a legatee, is a competent witness to a codicil under which the said legatee did not take, and in a suit to which the said legatee is not a party.

APPEAL from two judgments of the Superior Number of the Royal Court (May 19, 1887, and Oct. 13, 1887).

The questions in this appeal were whether a codicil to a will has by the law of Jersey a separate and independent existence from the will, and can stand alone; and whether, if so, the codicil in this case is itself a valid testamentary document; or whether, the will being invalid, the codicil must necessarily fall with it.

The codicil and the proceedings relating to it are set out in the judgment of their Lordships.

Sir *Horace Davey*, Q.C., and *W. R. Sheldon*, for the appellant, contended that the invalidity of the codicil did not necessarily follow from the invalidity of the will. The question must be decided on general principles of English law as administered in

* *Present*—LORD WATSON, SIR BARNES PEACOCK, SIR JAMES HANNEN, and SIR RICHARD COUCH.

the Ecclesiastical Courts of England, and relating to codicils as testamentary dispositions. There is neither law nor custom, nor legal precedent in Jersey which lays down that a codicil is necessarily an inherent part of the will to which it is appended, and can have no separate and independent existence therefrom. All the customs required by the law of Jersey to render the codicil a valid and effective instrument have been complied with. As regards the law administered in Jersey it is founded on the customs of Normandy existing A.D. 1205, when Normandy was separated from the English Crown. The only absolute authority is the "Grand Coutumier du Pays et Duché de Normandie," (see Commissioners' Report, 1861, p. iii.,) which does not mention either wills or codicils. In Rouille's edition published at Rouen in 1539 with later ordonnances, wills are mentioned but not codicils. Later coutumes or ordonnances are not recognised as of authority so far as they introduce new principles: see *La Cloche* v. *La Cloche* (1); *Thornton* v. *Robin* (2); *Dyson* v. *Godfray* (3). The only authority cited in the Courts below was French authority. But the droit écrit of France is not applicable in Jersey, nor the droit du coutumier, unless the custom is shewn to have existed in Normandy in 1205. As regards the Roman law, that recognised codicils by an intestate, and also by a person who has made, or subsequently makes, a will. Codicils charged the heir with the fidei commissa and legacies contained in them. If they charged the testamentary heir, and such heir was changed, they did not bind the substituted heir; if made by an intestate they bound whoever was the heir. Reference was made to Domat, Lois Civiles, bk. 4, tit. 1, p. 136 (Strachan's ed. 1737), vol. 2, p. 660 (Remy's ed. 1835); 7 Pothier, Traité du Droit Français, 273 (Dupin's ed. 1827); Merlin, Répertoire, tit. Codicille; 1 Loysel, arts. 300, 304. The respondent in the Court below relied on Ferrière, Dict. de Droit et de Pratique (ed. 1755), tit. Codicille, who cites Henrys, who lived in 1615–1661, and who was not acquainted with customary law: see an account of him in Biographie Universelle. The law to be followed in this case is the English law of wills, independent of

(1) Law Rep. 3 P. C. 125, and Law Rep. 4 P. C. 334.
(2) 1 Moore, P. C. 447, 453. (3) 9 App. Cas. 731.

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statute, and it becomes a question altogether of the testator's intention. Reference was made to *Barrow* v. *Barrow* (1). Prior to the Wills Act a codicil could stand by itself, the onus being to shew that the destruction of the will was not intended to destroy the codicil. Since this Act the onus is to shew that the codicil was intended to be destroyed. [LORD WATSON referred to *Corporation of Gloucester* v. *Osborn* (2) and to *Woodward* v. *Goulstone* (3).]

Jeune, Q.C., and *Dankwertz*, for the respondent, contended that the codicil was an inherent part of the will and fell with it. Both by the law of Jersey and otherwise the decision of the Court below was right. As regards the competency of the witness in the suit, the will and codicil were one subject of the same suit, and her evidence was inadmissible; there ought to have been two suits if her evidence relating to the codicil was to be admitted. The case is governed by Jersey law. The Grand Coutumier is not the sole authority for Jersey law: see Commissioners' Report, p. iii. La Somme Rurale, by Boutelier, a king's counsel, who lived in Paris, is constantly referred to by Le Geyt as an authority: see *Godfray* v. *Godfray* (4); see La Somme Rurale, p. 610, tit. 104, Le Caron's ed. Paris, 1611. A codicil is nothing but an addition to the will, and the rule of the Roman law is the rule of the country governed by the customary laws, so far as custom fails. Henrys is a great authority, at least on customary law, and Ferrière understands him to be laying down the customary law of France, and confirms him. [LORD WATSON refers to the passage cited as shewing a distinction between codicils dependent on a will and those independent.] This is a codicil entirely dependent on the will, intended to form part of it. The one was signed within a quarter of an hour of the other. The codicil was within the principle relating to interdependent documents. Not English law, but general principles of justice, govern the case. It is quite contrary to the testator's intention to uphold the codicil without the will. English law admits that it is a question of intention whether they should stand or fall

(1) 2 Lee's Ecc. Rep. 335.
(2) 1 H. L. C. 272.
(3) 11 App. Cas. 469.
(4) 3 Moore, P. C. (N.S.) 338.

together: see *Medlycott* v. *Assheton* (1). [SIR BARNES PEACOCK referred to *Allen* v. *Maddock* (2).] See *Grimwood* v. *Cozens* (3). With regard to a third view of this case, viz., the incorporation by a valid codicil of an invalid will, *Allen* v. *Maddock* (2) is an authority. [LORD WATSON:—After incorporation the two documents would remain distinct for all other purposes.] After incorporation it is submitted they would stand or fall together: see *Skinner* v. *Ogle* (4); *Anderson* v. *Anderson* (5). Then, as to gift of residue, that means the gift of intended residue. There was no intention to give the whole estate to the appellant, the gift of the residue was conditioned on the will taking effect: *Gibson* v. *Hale* (6); *Attorney-General* v. *Johnstone* (7); 7 Pothier, p. 39, c. 6, s. 5; 2 Basnage, 340; Ferrière on Justinian, vol. 3, p. 434 (ed. 1787), bk. ii. tit. 25, De Codicillis; see also ed. 1719, p. 400.

Sir *H. Davey* replied, referring to *Sugden* v. *Lord St. Leonards* (8).

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Dec. 1.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

Charles Le Vesconte Godfray, by a will, dated the 7th of March, 1886, bequeathed several legacies, and amongst them an annuity of £100 to one Thomas Gallop, but made no disposition of his residuary estate. The will was attested by two witnesses, one of whom, Caroline Gallop, was the daughter of Thomas Gallop. On the same day the testator made a codicil to his will in the following words:—

"7th March, 1886.

"Codicil to my will.—All my personal property not left in my left * to go my nephew Bertram Falle, he paying my debts.

"C. le V. Godfray."

* *Sic.*

This codicil was attested by the same witnesses.

The testator died on the 12th of March, 1886, and the will and

(1) 2 Add. 228.
(2) 11 Moore, P. C. 427.
(3) 2 Sw. & Tr. 364.
(4) 4 Notes of Cases, 74.
(5) Law Rep. 13 Eq. 381.
(6) 17 Sim. 129.
(7) 2 Amb. 577.
(8) 1 P. D. 154; see also *Follett* v. *Pettman* 23 Ch. Div. 337.

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codicil were proved in the Ecclesiastical Court of the Island of Jersey on the 16th of March, 1886. Shortly afterwards the respondent, Albina Godfray, the sister and one of the co-heiresses of the testator, brought an action in the Royal Court of Jersey against the executor and legatees, including the appellant, to have the will and codicil set aside and annulled, on the ground, among others which it is now not necessary to state, that the will and codicil were not duly attested, inasmuch as Caroline Gallop, one of the witnesses thereto, was more closely related to Thomas Gallop, a legatee under the will, than the law allows.

On the examination of witnesses before an officer of the Court, an objection was taken to the admissibility of the evidence of Caroline Gallop, the evidence being admitted and the objection referred by the officer to the Court. On this and other objections which were also referred coming before the Inferior Number of the Royal Court, they decided that inasmuch as by the custom of the bailiwick a relation in a nearer degree than that of cousin-german could not be heard as a witness, and Caroline Gallop was the daughter of Thomas Gallop, one of the legatees under the will, she was not a competent witness in the action. On the 19th of May, 1887, the Superior Number of the Royal Court, on an appeal from this decision, affirmed it. The action was then proceeded with, and on the 15th of June the Inferior Number of the Royal Court decided that, as Caroline Gallop had been declared an incompetent witness in the action by the judgment of the 19th of May, 1887, the will was not clothed with all the formalities required by the law and custom of the bailiwick, and accordingly set aside and annulled it, and, as regards the codicil, decided that, inasmuch as it was only supplementary to the will, and made to supply a blank in the will by appointing a residuary legatee, which the testator had neglected to do in the will, the codicil was an inherent part of the will and had no separate existence; and the will having been declared null, and the setting aside of the codicil following as of right, the Court also set aside and annulled the codicil.

From this decision several of the defendants appealed to the Superior Number of the Royal Court, which, on the 13th of October, 1887, gave the following judgment:—

"As to the validity of the said will, the Court, by the majority of opinions, adopting the reasons of the Court below, finds that the judgment is good and the appeal bad, and, as regards the said codicil, the Court decides that, in the matter in question, the said codicil is an inherent part of the said will and has no separate existence, and since the Court has declared the said will null, the annulling of the said codicil follows as a matter of course; therefore the Court quashes and annuls the said will and codicil."

The present appeal is from this judgment, and from that of the 19th of May, 1887, so far as they relate to the codicil, and, their Lordships being of opinion that Caroline Gallop was a competent witness to prove the codicil in the action to which Thomas Gallop was not a party, the only question is whether the Courts below are right in holding that, the will being declared null, the codicil falls with it.

In the judgment of this Committee in *La Cloche* v. *La Cloche* (1), delivered by Lord Westbury, it is said (2) that their Lordships had much difficulty in ascertaining what are the recognised authorities on the law of Jersey. Their Lordships have not been referred to any passages in the works there recognised, or the treatises of Le Geyt, or in the authors which he says in his preface are principally quoted in Jersey, which shew that by the law of Jersey, as by a rule in the Roman law, a codicil follows the condition of the testament, and is void if the testament is annulled. That rule is a logical consequence of the limited scope of a Roman codicillus, by which an heir could not be instituted or disinherited, but a fideicomiss could be imposed upon the testamentary heir or legatee; and it would still be followed where the Roman law respecting codicils prevails. The learned counsel for the respondent relied upon passages which he quoted from writers upon the law in the provinces of France where the Roman law prevailed. It did not in the Duchy of Normandy, from which the laws of Jersey were derived. The opinions of those writers cannot have the same value upon this question as they would if they were writing about the law of Jersey. The use which may be made of them is such as is stated

(1) Law Rep. 3 P. C. 125. (2) Page 136.

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in the judgment of *La Cloche* v. *La Cloche* (1) with regard to the Coutume de Paris and Coutume d'Orléans. They may be legitimately referred to for the purpose of testing the interpretation put on a custom of Jersey, and also for the purpose of explaining the force and effect of particular expressions. In this way they may have been referred to in the Jersey Courts. That is not how they were sought to be used in this appeal. Their Lordships were asked to treat them as shewing what is the law of Jersey. The passages relied upon do not profess to be statements of the law or custom of Normandy, or to be founded upon it, and their Lordships cannot accept them as authorities for the law of Jersey.

In the absence of authority their Lordships have to determine whether it is reasonable that as an absolute rule of law a codicil is dependent on the will, and if the will is void the codicil must fall with it. If a testator, by a codicil duly executed, gives a specific legacy, having, in a previous will not duly executed, given other legacies, it does not seem reasonable that his intention expressed in the codicil should not be given effect to because effect cannot be given to the intention expressed in the will. Domat, in part 2, book 4, tit. 1, sect. 2, Strachan's translation, in his remarks on article 4, speaking of the rule of the Roman law, says, "We should be afraid to trespass against equity if we should lay it down as a general rule either that all codicils are valid when there is no testament, or that they are null when there is a testament which is found to be null." Their Lordships consider it is a sound rule that when effect can be given to the intention of a testator it should be given; and in the absence of any authority that the rule in the Roman law had become part of the customary law of Jersey, they would rather adopt a rule of law which gives effect to the intention of the testator than one which defeats it.

There remains the question as to what is included in the gift of the residue. It appears to their Lordships that the authorities upon the French law which were quoted do not differ from the English law on this matter, and that on principle, as well as by analogy to those laws, the legacies given by the will fall into the residue.

(1) Law Rep. 3 P. C. 138.

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Their Lordships will, therefore, humbly advise Her Majesty to reverse the decrees of the Royal Court appealed from so far as they affect or annul the codicil and condemn the appellant Falle in costs, and in lieu thereof to declare that the codicil was duly proved.

The respondent will pay the costs of this appeal.

Solicitors for appellant: *Powell & Goodale.*

Solicitor for respondent: *Saunders, Hawksford, Bennett, & Co.*

[PRIVY COUNCIL.]

JEX . . . . . PLAINTIFF;

AND

McKINNEY AND OTHERS . . . . . DEFENDANTS.

J. C.*
1889
Jan. 26;
Feb. 8.

ON APPEAL FROM THE SUPREME COURT OF BRITISH HONDURAS.

Law of British Honduras—Mortmain Act (9 *Geo.* 2, *c.* 36)—*Introduction of English Law.*

Held, that, on the true construction of the local Acts and Ordinances, the Mortmain Act (9 Geo. 2, c. 36), has not been introduced into British Honduras. Although the said Act is included in the description of laws thereby introduced, yet its provisions do not satisfy the prescribed condition of applicability to the colony.

Attorney-General v. *Stewart* (2 Merivale, 143), and *Whicker* v. *Hume* (7 H. L. C. 134) approved.

APPEAL from an order of the Supreme Court (Jan. 24, 1888) made on demurrer to the appellant's statement of claim.

The appellant's father, the testator in the cause, devised and bequeathed certain real and personal estate to his executors in trust to sell the same and divide the proceeds equally amongst certain Protestant churches in Belize, viz., the Episcopalian Church, the Wesleyan Methodist Church, and the Baptist Church.

* *Present:*—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR WILLIAM GROVE.

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The appellant sued for a declaration that such devise was void as being contrary to 9 Geo. 2, c. 36.

The respondents, being the executors and the representatives of the three churches, demurred on the ground that the said Act of George II. was not in force in the Colony.

The Chief Justice allowed the demurrer, holding that no Act or Ordinance of the local legislature had extended the operation of that Act to the Colony.

The material sections of the enactments relating to the introduction of English law into the Colony are set out in their Lordships' judgment.

Sir *Horace Davey*, Q.C., and *Cowell*, for the appellant, contended that the ruling of the Chief Justice was wrong, and that the Act of George II. had been introduced into the Colony by words apt for that purpose. By these local enactments all English statutes and laws relating to wills, inheritance, and succession which have general operation throughout England, as distinct from a more limited operation, had been introduced or declared to be in force in the Colony, so far as the jurisdiction of the Court and local circumstances permit. Those Acts, moreover, contained provisions designed to facilitate the application of English laws so introduced. An English Act might be read as if it had been made and passed in the Colony. The Court was empowered to construe it with such verbal alterations not affecting the substance as might be necessary to render it applicable. It might read Supreme Court for the Court of Chancery. Both the judgment of the Chief Justice and the judicial opinion of his predecessor treated these provisions as rendering enrolment in the Colony equivalent to enrolment in the Court of Chancery in England. They submitted that the Act 9 Geo. 2, c. 36, was an Act relating to the above subjects, and was also in derogation of the common law; that it answered the condition of having general operation throughout England; that according to the true nature and character of its provisions, as distinct from the policy on which it is founded, it merely restricted testamentary power and prescribed a particular mode of alienation; that it was by force of the local Acts placed in connection with the

local machinery required for its application; and that there was nothing in local circumstances or in the jurisdiction of the Court to prevent or in any way impede its application. The judgment of the Court below was not based upon any difficulty, arising either from local circumstances or from its jurisdiction, in giving effect to the Act in question, but upon its views as to the policy of introducing it. It was submitted that the policy of introducing the Act was a question for the legislature, and had not been by force of the local Acts delegated to the Court to determine.

Reference was made to *Attorney-General* v. *Stewart* (1), and *Whicker* v. *Hume* (2).

Cozens-Hardy, Q.C., and *Upjohn*, for the respondents, were not heard.

1889
Feb. 8.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The sole question in this case is whether the statute of 9 Geo. 2, c. 36, often, though inaccurately, called the Mortmain Act, is in force in the Colony of British Honduras. The appellant is the heir-at-law of John Jex, claiming, as under an intestacy, property given by that gentleman's will to certain churches in the Colony. The respondents maintain the validity of the gifts. They do not deny that the gifts are of such a nature as the statute in question forbids. The appellant does not assert that the statute is one of those which from their nature should be treated as forming part of the body of law which Englishmen carry with them to a new colony. What is asserted by the appellant and denied by the respondents is that the statute has been introduced into the Colony by certain Ordinances or Acts of Assembly passed in the Colony itself.

The most important of these colonial laws is that which received the royal assent on the 8th of March, 1856, and is entitled "An Act to declare the laws in force in this Settlement." It will be convenient here to state the passages which bear on the present question.

(1) 2 Merivale, 143. (2) 14 Beav. 526; 1 D. M. & G. 507; 7 H. L. C. 134.

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Sect. 5 enacts:—

"That so much of the common law of England as has been used in or is applicable to this Settlement, and the inhabitants thereof, . . . and all statutes of the Imperial Parliament in abrogation or derogation, or in any way declaratory, of the common law, shall be and continue, and are hereby declared to be, part of the laws of this Settlement."

Sect. 6 is confined to criminal law, and establishes as laws of the settlement the statutes there described "in so far as the same are applicable or can be applied to this Settlement and to the inhabitants thereof."

Sect. 7 enacts:—

"That all laws of universal application relating to . . . descents, inheritances, and successions; to wills and administrations . . . or generally in relation to property . . . in so far as they are applicable or can be applied to this Settlement and the inhabitants thereof, and are not at variance with or qualified by any local law or recognised custom thereof, shall be and the same are hereby declared to be laws of this Settlement; but this is not extended to any law of any local or limited operation, or to any law relating to bankruptcy or insolvency, or to any Act relating to customs or excise, or to any law relating to or regulating any trade, business, or profession."

By a subsequent Act, which came into force on the 27th of October, 1865, it was, with reference to the Act of 1856, declared that the term "'laws of universal application,' used in the seventh section of the said Act, include all such statutes and laws, being of the nature and character therein respectively described, as now have or shall hereafter have general operation throughout that part of the United Kingdom of Great Britain and Ireland called England."

By Ordinance No. XIV., which came into force on the 2nd of October, 1879, it is enacted in sect. 29 as follows:—"Wherever by this Ordinance, or any other Act or Ordinance, it is declared that any Imperial laws shall extend to the Colony, such laws shall be deemed to extend thereto so far only as the jurisdiction of the Court and local circumstances permit, and subject to any existing or future Acts or Ordinances of the colonial legislature. And

for the purpose of facilitating the application of the said laws, it shall be lawful for the presiding judge to construe any enactment of an Imperial statute with such verbal alteration, not affecting the substance, as may be necessary to render the same applicable to the matter before the Court."

The statute of George II. falls within several of the expressions used in these enactments. It is in derogation of the common law; it relates to successions, and to wills, and to property; and it has general operation throughout England. Whether it also falls within the excepted laws of local or limited operation may be a question of difficulty; but their Lordships do not find it necessary to express any opinion on that point, because they think that the statute is not of such a nature as to fall within the description of laws which are applicable, or can be applied, to British Honduras.

This condition of applicability to the Colony runs through the whole of the enactments above stated. It is expressly attached to the common law dealt with by sect. 5 of the Act of 1856, and to the laws dealt with by sect. 7. When laws in abrogation or declaratory of the common law are mentioned, they are not expressly qualified by the same condition; but it must be implied, because it would be absurd to suppose that common law is to prevail in the Colony only if suitable, and that laws abrogating it are to prevail whether suitable or not.

It has been argued at the bar that the laws described are to prevail if they are applicable or can be applied, and that the latter words give a wider sense to the word "applicable." Their Lordships read the words "can be" as meaning "can reasonably be," agreeing herein with Lord Justice Knight Bruce, who in *Whicker* v. *Hume* (1) placed that construction upon similar words in a New South Wales Act. The change of expression would rather seem to point to such cases as are provided for by the Ordinance of 1879, where some amount of moulding in formal or insignificant details is required before an English statute, suitable in its nature to the needs of the Colony, can be actually applied to them.

If the Colonial enactments are to be construed in this way, we

(1) 1 D. M. & G. 506.

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are brought back to the question whether the statute of George II. is suitable to a young English colony in a new country. The principle on which such questions should turn has been laid down by Blackstone in his Commentaries, vol. i. p. 108. It has been applied to the statute of George II. in two English decisions, and every judge who has addressed his mind to the question has come to the same conclusion. In *Attorney-General* v. *Stewart*, with reference to Grenada, Sir William Grant; in *Whicker* v. *Hume*, with reference to New South Wales, Lord Romilly at the Rolls, Lord Justices Knight Bruce and Cranworth in the Court of Appeal; Lord Chelmsford, Lord Cranworth, and Lord Wensleydale in the House of Lords; all decided that the statute was framed for reasons affecting the land and society of England, and not for reasons applying to a new colony. Their Lordships think the reasoning on which those decisions are founded is sound reasoning, and is applicable to British Honduras as the Court below has applied it. The result is, that the appeal ought to be dismissed, and they will so humbly advise Her Majesty. The appellant's next friend must pay the costs.

Solicitors for appellant: *Parker, Garrett, & Parker.*
Solicitors for respondents: *Rooke & Sons.*

[PRIVY COUNCIL.]

BHUGWANDASS . . . . . PLAINTIFF;

AND

THE NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA . . . . . DEFENDANT.

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Nov. 7, 9; Dec. 1.

ON APPEAL FROM THE COURT OF THE RECORDER AT RANGOON.

Marine Insurance—"Open Cover"—Refusal of Policies in Terms of Cover—Specific Performance.

An open cover, or proposal to insure before the goods to be insured are shipped, was given by the respondents to *M.* in order that he might give it to the charterer, who after shipment applied for policies to the amount mentioned in the cover and was refused:—

Held, that such application constituted an acceptance of a subsisting proposal, and that there was a binding contract with the charterer to issue a policy in terms of the open cover. The asking for two policies did not prevent the acceptance being sufficient as there was a refusal to give any.

APPEAL from a decree of the Court of the Recorder (July 23, 1886), dismissing the appellant's suit for the specific performance of a contract made by the respondent company to deliver a policy of insurance not exceeding Rs.15,000 on rice and disbursements for and on the *Copeland Isle* on a voyage from Rangoon to Bombay.

The facts are stated in the judgment of their Lordships.

The plaint alleged that on the 9th of March, 1885, at Rangoon, the appellant entered into an agreement with one James Macrory for a charter of the latter's vessel, *Copeland Isle*, from Rangoon to Bombay, and that Macrory guaranteed the vessel a good insurance risk, and undertook to obtain insurance for such goods as the appellant should ship by her. That the appellant, intending to ship 1000 bags of rice on board of her, required Macrory to obtain insurance for the sum of Rs.15,000 upon the rice and the disbursements which the appellant was to make on account of the vessel. That Macrory applied to the agents of the respon-

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

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dents at Rangoon to accept an insurance risk to the extent of Rs.15,000 by the *Copeland Isle* to Bombay, which they agreed to do, and in due course issued an "open cover" for the same. That Macrory brought and made over to the appellant the "open cover," and at the same time indorsed it over to the appellant, in accordance with the custom prevalent in Rangoon, and thereafter the appellant executed a charterparty for the said vessel. That the appellant shipped 1000 bags of rice on the *Copeland Isle*, and disbursed on her the sum of Rs.4000, and on the 31st of March, 1885, wrote to the respondents' agents a letter requesting them to declare policies of insurance on 1000 bags of rice, value Rs.10,000, and the disbursement of the vessel from Rangoon to Bombay, Rs.5000, and inclosed the premium. That the respondents on the 1st of April, 1885, replied by letter regretting that as they did not grant the appellant an "open cover" they could not issue a policy, and returning the premium. That the respondents persistently refused to issue the policy, and that the *Copeland Isle* whilst proceeding on her voyage to Bombay was totally lost. The appellant claimed specific performance of the said contract of insurance with costs.

The substance of the respondents' defence was as follows:—

(*a.*) That the document sued on (which the respondents alleged was for convenience made out in an open cover form), was at the request of the said J. Macrory given to him by the respondent company as an intimation in writing of its willingness to insure rice which might be shipped in the said vessel, and to enable other insurance offices to know that the company considered such vessel a fair risk, and that for this reason it was not signed by the company's agents or registered in its books as it would have been had it been issued by them in due course and as a preliminary to granting a policy of insurance; and moreover that such document did not cover disbursements.

(*b.*) That the plaintiff was, before the sailing of the vessel, and in the presence of the said J. Macrory, informed by the company's agents of the circumstances under which the document sued on was given, and Macrory did not dispute what was then stated.

(*c.*) That the company on the 25th of March, 1885, granted to

Annamallay Chetty a policy of insurance for Rs.17,500 on rice shipped by him in the same vessel, thus taking a larger risk than the amount named to Macrory.

(*d.*) That the document sued on is not transferable by indorsement, delivery, or otherwise, and that there was no custom in Rangoon permitting the transfer by indorsement or assignment of open covers.

(*e.*) That Macrory never shipped any rice in the said vessel, and had no insurable interest in the rice shipped therein.

(*f.*) That on the company's refusal to grant plaintiff a policy he should have insured elsewhere, but did not do so, and that the vessel, having been totally lost at sea before the institution of the suit, the plaintiff was not entitled to a specific performance of the document sued on.

(*g.*) That the amount at which the plaintiff valued the rice and assessed his disbursements was excessive.

The recorder dismissed the appellant's suit with costs, holding, inter alia, that the document sued on was a complete and final contract, binding on the company, if capable of being enforced, but that it was not capable of being enforced, for the reason that Macrory had no insurable interest in the subject-matter thereof, and that the plaintiff claiming as the assignee of Macrory, by virtue of his indorsement on the open cover, could claim no higher rights than Macrory could claim, and, further, that Macrory was not the agent of the plaintiff in effecting the contract of insurance sued on.

The material passages in the recorder's judgment are as follows:—

"The plaintiff first claims as the assignee of Macrory by virtue of his indorsement on the open cover; as assignee simply the plaintiff could claim no higher rights than Macrory could claim. Macrory admittedly never had any insurable interest in the rice shipped by the *Copeland Isle.* If he had claimed a policy on the open cover, the fact of his having had no insurable interest in the rice would be a complete answer to his claim, for the Court would not compel the defendants to deliver to him what would be a mere piece of paper of no legal force.

"The plaintiff, however, sets up a custom or mercantile usage

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in Rangoon by which the indorsee or holder of an open cover is entitled to a policy irrespective of the person to whom the open cover may have been issued. It would, in my opinion, require very strong evidence to prove that in this town a custom or mercantile usage had sprung up and had gained such force as to override one of the essential principles of marine insurance prevailing through all other parts of Her Majesty's dominions. There is no doubt that the execution of the open cover does constitute the contract for marine insurance, and one of the most essential principles of the law of marine insurance is that the assured must at the time the contract is made have an insurable interest in the subject-matter insured.

"The evidence given to prove the alleged custom or usage is far from proving a general, uniform, notorious, settled and acquiesced-in custom or usage, such as might vary the legal rights of the contracting parties, or create new obligations with other parties. It may be that in some cases policies have been issued on open covers to persons other than the persons to whom the open covers were issued; obviously in the majority of cases it must be a matter of indifference to the insurers whether they issue the policy in the name of the person to whom they issued the open cover, or in the name of the person who may produce the open cover to them; but although such cases may have occurred they would afford no ground for holding that in consequence the principle of marine insurance law which I have mentioned does not apply in Rangoon.

"The plaintiff lastly seeks to get over the difficulty occasioned by the above rule of law by the contention that Macrory in effecting the contract was acting as the agent of the Plaintiff, who, of course had an insurable interest in the rice shipped by him. Macrory obtained the open cover under the following circumstances, so far as the plaintiff was concerned; he (Macrory) wanting to get a charter for his ship, applied to the plaintiff, who entered into negotiations with him, and approved of the terms of the proposed charterparty. The plaintiff, however, made one essential stipulation before concluding the charterparty, and that was, that Macrory should produce to him something to shew that insurance risks would be taken by the insur-

ance companies on the cargo shipped by the vessel. In order to satisfy this stipulation Macrory went to various insurance offices, starting with the agents of the defendant company, and obtained the document sued upon, and four other open covers, which he indorsed over to the plaintiff, who then executed the charter-party. What happened seems to have been done in pursuance of a practice which has been followed by other local shipowners like Macrory, who, according to the evidence of Mr. Borland, apply to insurance agents here for open covers, in order to be able to shew them to persons whom they may ask to charter their vessels, as a guarantee that cargo shipped by them will be insured.

"Under the circumstances stated I do not think it can be said that the relation of principal and agent can be said to have existed between the plaintiff and Macrory. At the time when Macrory was effecting the arrangements he made with the insurance agents it was quite uncertain whether the plaintiff would ship any rice on board the vessel."

Barnes, Q.C., and *Agabeg*, for the appellant, contended that he was entitled to judgment. As regards insurable interest the recorder erred in holding that an insurer must have an insurable interest at the date of contract. That has not been the law for the last 100 years; it is sufficient if he has an interest at the date of loss. Whether Macrory had an insurable interest or not was immaterial; either way he could contract for the benefit of the shipper of the goods insured. There was nothing either in the law or the custom to prevent him from doing so, or to prevent the appellant from adopting and suing upon the contract so made. He did adopt it when he signed the charterparty on the faith of it, and from that moment there was a completed contract between him and the respondents. Reference was made to *Sutherland* v. *Pratt* (1); *Irving* v. *Richardson* (2); *Routh* v. *Thompson* (3); *Fisher* v. *Liverpool Marine Insurance Company* (4); Arnould on Insurance, 4th ed. p. 1027, and the cases there cited.

(1) 12 M. & W. 16.
(2) 2 B. & Ad. 193.
(3) 13 East, 274.
(4) Law Rep. 9 Q. B. 425.

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Cohen, Q.C., and *Arbuthnot*, for the respondent, contended that the recorder's judgment was right. Macrory had no insurable interest either at the date of contract or the date of loss, and therefore could not make for himself a contract of insurance. He could not transfer such invalid contract, either by law or by the alleged custom, so as to give the transferee greater rights thereunder than he had himself. The finding of the recorder that Macrory was not the agent of the appellant to make this contract on his behalf was right according to the evidence, and ought not to be disturbed. Besides, the document given by the respondents to Macrory was never intended to be, and was not given as an "open cover." Its effect was a representation by the company that it considered the vessel a fair risk, and that it would be willing to negotiate a policy in respect of cargo shipped thereon. Reference was made to *Dickinson* v. *Dodds* (1); *Mackenzie* v. *Coulson* (2). Even if the open cover constituted an offer there was no unqualified acceptance of it within a reasonable time.

Barnes, Q.C., replied, citing *Weidner* v. *Hoggett* (3); Fry on Specific Performance, sect. 445; *Great Northern Railway Company* v. *Witham* (4); *Ionides* v. *Pacific Insurance Company* (5); *Morrison* v. *Universal Marine Insurance Company* (6).

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The appellant in this case brought a suit against the respondents for specific performance of a contract of insurance. The Recorder of Rangoon, in whose Court it was brought, dismissed the suit, with costs, and this appeal is from that judgment.

In March, 1885, one John Macrory, a shipbuilder and owner of a vessel called the *Copeland Isle*, then lying in Rangoon river, applied to the plaintiff, a merchant carrying on business at Rangoon, and also at Calcutta and Bombay, to charter that vessel.

(1) 2 Ch. D. 463.
(2) Law Rep. 8 Eq. 368, 374.
(3) 1 C. P. D. 533.
(4) Law Rep. 9 C. P. 18.
(5) Law Rep. 16 Q. B. 674.
(6) Law Rep. 8 Ex. 40; see also *Lishman* v. *Northern Maritime Insurance Company*, Law Rep. 8 C. P. 225.

The evidence of the plaintiff, who was examined as a witness, was as follows:—

"I said to Macrory, that if an open cover were given to me free of particular average I would charter the vessel. When the charterparty was drawn and brought to me by Macrory and Sutherland (one of the brokers who arranged the charter), I said, 'Where is the open cover?' Then Mr. Macrory gave me this open cover, with these five others. When I got these the charterparty was signed by me. I shipped goods on the *Copeland Isle*, I shipped my own goods, 6220 bags of rice. This is a copy of the charterparty. Subsequently I went to Messrs. Finlay Fleming, Messrs. Strang Steel, and Messrs. Gladstone Wyllie's, for policies on the covers. I got policies from all, except from Messrs. Gladstone Wyllie. I went to Gladstone Wyllie's and saw Mr. Bertram. I went three times to them before I wrote to them. Once I saw Mr. Bertram, and twice Mr. Gordon. I shewed Bertram the open cover and asked him for policies for Rs.100,000, for 1000 bags of rice, and Rs.5000 for disbursements. Mr. Bertram said, 'We have given a policy to a chetty.' That was, I believe, for Rs.17,500. I said, 'I have no concern with the chetty's policy. I want the policy for my goods.' Bertram said he would not give one. I then went to Gordon, who was the then manager of Gladstone Wyllie's. Gordon said, 'I cannot give a policy, go to Mr. Macrory.' I went that day or the next day, with Macrory to Gordon. Macrory asked Gordon to give the policy, as the ship was to be cleared. He spoke for a long time and so did I. We both pressed Gordon to give one, but he said he would not. Then I said, 'If you do not give one I will send the customary notice.' Afterwards, I addressed a letter to Gladstone Wyllie, as the agents of the defendants' company."

The open cover was in these terms:—

"Rangoon, 9th March, 1885.

"Netherlands India Sea and Fire Insurance Company of Batavia.

"Dear Sir,—We hereby consider you insured under an open cover, to the extent of Rs.15,000 only, on rice per *Copeland Isle* Captain , Rangoon to Bombay.

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"Premium, 2 per cent.
"Free of war risks.
"Average f. p. a.
"Policy to be applied for before the ship sails, and vessel to be towed by steamer to sea.

"Yours faithfully,
"Gladstone Wyllie & Co.,
"J. R. BERTRAM,
"Agent in Rangoon.

"To R. Macrory, Esq."

(On the back.) "J. MACRORY."

The letter to Gladstone Wyllie as the defendants' agents abovementioned, was dated the 31st of March, 1885, and requested them to declare policies of insurance on 1000 bags of rice, value Rs.10,000, and on disbursement of the vessel from Rangoon to Bombay, Rs.5000, and it enclosed Government promissory notes for Rs.300 for the premium. Gladstone Wyllie & Co. replied by letter dated the 1st of April, 1885, saying, "As we did not grant you an open cover by the *Copeland Isle*, we regret we cannot issue a policy, and we return Rs.300, in Government currency notes which you sent us." On the 1st of April the plaintiff again wrote, stating that Macrory had transferred the open cover to him, and enclosing it with the Government notes, to which Gladstone Wyllie & Co. replied on the 2nd of April, that they could not recognise the transfer by Macrory of the open cover, and that they never entered into any engagement to grant the plaintiff a policy for Rs.15,000.

Although the plaintiff at the interviews with Bertram and Gordon, and in his letter of the 31st of March, asked for two policies, he appears not to have insisted upon having the insurance in that way, and the defendants' agents did not take the ground that the open cover did not bind them to give a separate policy for disbursements, but absolutely refused to issue any policy. Their Lordships think the defendants cannot say that the plaintiff was not willing to take a policy on rice for Rs.15,000. Whether upon such a policy he could recover the disbursements or the Rs.4000 advanced on account of freight it is not now

necessary to determine. In his plaint he has simply asked for a policy of insurance in terms of the open cover.

When the defendants' agents refused to issue a policy to the plaintiff, he endeavoured to obtain an insurance on the cargo uninsured from other offices in Rangoon and Bombay, but did not succeed. The *Copeland Isle* proceeded on her voyage to Bombay on or about the 1st of April, 1885, and was totally lost in a cyclone on the following 10th of June.

To return to the evidence. About the open cover, Macrory said (omitting passages which it is not necessary to read):—

"I remember this open cover. I got it for the charterer, Bhugwandass. I was to see if an insurance could be effected on the cargo before he would sign the charterparty. I made it over to Bhugwandass, and indorsed it. . . . I made all the covers over to him on his signing the charterparty. . . . I saw Mr. Gordon when I first got this open cover. . . . I asked Mr. Gordon if he would take a risk, as I could get a charter if he would take a risk. I did not say that I only wanted it to shew to other companies, and not as an undertaking to issue a policy. . . . Mr. Bertram was present in Gordon's room when I had the conversation with Mr. Gordon, and immediately after I got the open cover . . . I went out of Gordon's room with Bertram. I got the open cover from Bertram in his room. I talked to Bertram there about the ship and the money I had expended on her, and the condition she was in. I said that if I could get an insurance I could effect a charter. I mentioned Bhugwandass as the charterer. . . . I asked Gordon whether he would insure a part of the cargo, or as much as he could take. When he said that he could take up to Rs.15,000, I asked for an open cover to that effect. I think the open cover was taken out of a book. I do not remember who put the stamp on."

Mr. Gordon was not examined as a witness, and there was a satisfactory explanation of this omission. Mr. Bertram was examined, and said:—

"I am an assistant in the firm of Messrs. Gladstone Wyllie & Co., in Rangoon. The firm are the agents of the defendants' company in Rangoon. I saw Macrory on the 9th of March, 1885, with reference to the vessel the *Copeland Isle*. He came

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to me personally at half-past two. . . . . He asked me for a chit to shew the other insurance offices that we were prepared to take insurance on the *Copeland Isle;* of course that had reference to what had previously taken place when the matter was arranged by Mr. Gordon. . . . . I heard Gordon tell Macrory that he would be willing to take a risk up to Rs.15,000 on the vessel for the defendant company. . . . . At this second interview Macrory asked if we would give him a letter to shew to Steel's and to Finlay's so that they could see that we were willing to take insurance on the vessel. I gave him a paper. This (the open cover) is the paper I gave. I used this form because he wanted something definite to shew to people, mere word of mouth not being sufficient. I chose an open cover form because it was the most convenient thing we had, and it was much easier for me to fill up this form than to write an open letter. . . . . We said that we were prepared to accept a risk on the *Copeland Isle* to the extent of Rs.15,000. Nothing was said about giving an open cover or a policy. Gordon said this. . . . . We knew at the time Macrory had no rice to ship."

Mr. John Anderson, a witness for the plaintiff, whose firm are agents for several marine insurance companies in Rangoon, said:—

"An open cover is issued generally before the shipment of the goods to be insured. After the goods are shipped the party producing the open cover gets a policy on payment of the premium. I do not know if we ever had a case of the kind, but our firm would issue a policy to the person producing the open cover to us, notwithstanding the open cover had been issued in another person's name." On cross-examination he spoke to the same effect.

Mr. John Borland, another witness for the plaintiff, whose firm at Rangoon also are agents for several marine insurance companies, said:—

"If we issued an open cover to A., and afterwards B. shipped the cargo, we should have no objection to issuing the policy to B." And on cross-examination,—"I have many times issued an open cover to a man who has not an insurable interest. If Macrory came to us and told us he could not get a charter unless he got open covers on the cargo to be shipped, we would issue open covers to him, and look to him for the premium until we

had intimation that the cargo had been shipped by some one else, and that the open cover was held by the shipper."

Upon the evidence in the suit their Lordships have come to the conclusion that the open cover was given to Macrory in order that he might give it to the charterer of the vessel, and that it was a proposal to insure. Although addressed to Macrory, it could not have been intended for his acceptance, as it was known that he was not going to ship the rice. When he handed it to Bhugwandass it was a subsisting proposal capable of being accepted by him, and when Bhugwandass went to Gladstone Wyllie's and shewed Bertram the open cover, and asked him for policies, there was an acceptance of the proposal so as to make a binding contract with Bhugwandass to insure and issue a policy in terms of the open cover. The asking for two policies did not prevent the acceptance being sufficient, as Bertram absolutely refused to give any policy.

The letter of the 1st of April, 1885, refusing to issue a policy, and of the 2nd of April, refusing to recognise the transfer to Bhugwandass of the open cover, have been noticed. It is to be observed, that neither in the interviews with Bhugwandass, nor in the letters, was it said that the paper given to Macrory was not intended to be an open cover. Indeed, in the letter of the 2nd of April it is so called. It was argued by the learned counsel for the appellant that the contract became complete when the charterparty was signed, and the proposal to insure was acted upon. It is not necessary for their Lordships to give any opinion upon this contention, as they hold that the acceptance by Bhugwandass was made whilst the offer to insure was subsisting, and was sufficient to complete the contract. The plaintiff is entitled to specific performance, and their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder's Court, and to make a decree that the defendants or their agents do make and issue a policy of insurance in terms of the open cover, and for the amount therein mentioned, and do pay the costs of the suit. The respondents will pay the costs of the appeal.

Solicitors for appellant: *Bramall & White.*

Solicitors for respondents: *Freshfields & Williams.*

[PRIVY COUNCIL.]

J. C.* REID AND ANOTHER . . . . . PLAINTIFFS;

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AND

Feb. 7, 8, 16. GARRETT . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Crown Lands Act of 1884, *ss.* 76, 78—*Pastoral Lease of Leasehold Area—Rent runs from Date of Notification.*

Held, that in respect of pastoral leases of leasehold areas granted under the Crown Lands Act of 1884, the rent reserved therein is in all cases, by virtue of the provisions of that Act, to be computed from and be payable from the date of the notification issued under sect. 76 of that Act, at which date the right to hold at the rents reserved in leases granted under former Land Acts is determined.

APPEAL from a judgment of the Supreme Court (May 3, 1888), upon a special case stated under 17 Vict. No. 21, sect. 42, whereby it was ordered that judgment be entered for the respondent with costs. The question decided in the appeal was whether the rent of the appellants' pastoral lease granted under 48 Vict. No. 18, was to be computed and payable from the date of the notification of such lease under sect. 76, or from the mean date of determination of the leases held by the appellants on the 1st of January, 1885, the day on which the said Act came into force, of the runs comprised in their pastoral holding.

The facts are stated in the judgment of their Lordships.

Rigby, Q.C., and *Joyce*, for the appellants, contended that, according to the true construction of the Act of 1884, the rent of the pastoral lease of the leasehold area of the appellants' pastoral holding did not commence until a date later than the 1st of January, 1885. Such date must be calculated with due regard to the mean date of determination of the existing leases held by the appellants before and at the time when the Act of 1884 came into force. The rights of the appellants under those existing

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and LORD MACNAGHTEN.

leases were protected by sect. 2, subject to any express provisions contained in the Act. It did not appear that there were any provisions in the Act whereby the rent payable under such existing leases was to be increased or otherwise altered. Reference was made to 25 Vict. No. 2; 39 Vict. No. 13; 43 Vict. No. 29, and to the Act of 1884, sects. 2, 4, 70–76, and 78.

Sir *Horace Davey*, Q.C., and *Leverson*, were not heard.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

This is a special case stated in an action brought by the plaintiffs against the representative of the Crown to assert their right of holding certain lands at a rent less than is demanded by the Crown. Two questions are put to the Court. Question A relates to a claim made by the plaintiffs that some expired leases should be extended or renewed. It has not been argued, and all that their Lordships have to say upon it is that, so far as the opinion of this Committee is concerned, the question is an open one.

Question B is as follows:—

"B. Whether the rent of the pastoral lease of the leasehold area, granted to the plaintiffs under and by virtue of the provisions of the Crown Lands Act of 1884, is to be computed from and be payable from the date of the said notification in the Government Gazette, or from a date calculated with due regard to the mean date of determination of the leases of the said runs held by the plaintiffs before and at the time of the coming into force of the Crown Lands Act of 1884?"

On the 1st of January, 1885, when the Crown Lands Act of 1884 came into force, the plaintiffs held a number of runs upon leases granted under previous statutes, and limited to expire at various later dates. Their claim is to hold what remains to them as the "leasehold area" of such runs at the rents secured by such leases until their expiry by efflux of time, or rather until a time calculated as the mean date of such expiry. The Crown contends that it is entitled to the increased rent determined under the Act of 1884 from the date of the notification issued under that Act.

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By sect. 2, sub-sect. II. of the Act of 1884 it is enacted that the repeal of the earlier Land Acts should not of itself—

"Affect any grant, lease, licence, reservation, dedication, proclamation, appointment, or notification lawfully made before the commencement of this Act."

And again,—

"(*b*) All rights accrued and obligations incurred or imposed under or by virtue of the said repealed enactments shall, subject to any express provisions of this Act in relation thereto, remain unaffected by such repeal."

The plaintiffs therefore are right in saying that their rights as lessees continue until displaced by the express terms of the Act of 1884, and we have to ascertain what those terms are.

By sects. 71 and 74 every runholder is compelled, under peril of losing the benefit of a pastoral lease, to lodge with the Minister a written application for one within a fixed time. For that purpose he is to furnish detailed information about his holding, and to divide it into two parts, one to be the resumed area and the other the leasehold. When that division has been made to the satisfaction of the Minister, he elects which of the parts shall be resumed and which leasehold. Then come the provisions of sect. 76, which are as follows:—

"When the division of the run shall have been determined by the Minister as herein-before provided, a notification thereof shall be published in the Gazette, and the runholder shall thereupon become entitled to a pastoral lease of the leasehold area; provided that until the rent thereof be determined he shall continue to pay the same rent as before the division of such runs, and when the rent shall be determined as hereinafter provided he shall for the time elapsed pay the difference between the rent paid and the rent determined."

Sect. 70 enacts that all pastoral holdings shall, subject to the provisions of the Act, and until brought thereunder by notification in the Gazette, be subject to the same terms and conditions as before. But after the notification the whole condition of things is altered. One half of the holding is made liable to the treatment prescribed for resumed areas; the other half is to be

held on pastoral lease, not at the former amount payable for the whole, but at a new amount to be determined in due course, and when determined to attach as from the date of the notification. So far then it appears to their Lordships that the Act of 1884 imposes the new rent as from the notification, not only in express terms, but in terms not admitting of dispute.

This conclusion indeed was hardly contested at the bar, but it was said that the terms of sect. 78 were repugnant to it, and at least created such doubt that the previous rights of the runholders ought not to be disturbed. Sect. 78 prescribes the provisions subject to which the Crown may grant pastoral leases of leasehold areas. Lands are divided into three classes, the Western, Central, and Eastern divisions. To the Western division, in which are the plaintiffs' holdings, some material advantages are given. The leases there are to be for fifteen years, whereas leases in the Central division are to be for ten years, and in the Eastern for five. The minimum rent in the Western division, as also in the Eastern, is to be 1*d.* per acre, whereas in the Central it is to be 1½*d.* And whereas in the two other divisions the pastoral lease begins to run from the notification, in the Western division "every such lease shall commence at the date of determination of the existing lease, or, if more than one lease be held by the same runholder, then at a date calculated with due regard to the mean date of determination of such leases." And, with respect to the same division, it is enacted that the rent determined shall apply to the first five years of the lease, to be increased by one quarter for the next five years, and by one half for the residue of the term.

It is these two latter passages on which the second alternative in question B is founded, and on which the appellants contend that the new rent is postponed until the time appointed for the commencement of the new lease. But immediately after the clause postponing the commencement of leases in the Western division, the Act goes on to say that the rent shall in all cases commence with the date of the notification. This, say the appellants, should be taken as applying to those cases in which the lease runs from the notification, and is calculated to cover only the gap of time intervening between the notification and the determination of

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the new rent. That, however, had already been done by sect. 76, and there is no ground for departing from the ordinary meaning of the words "in all cases." Their Lordships are of opinion that all the enactments on this point are consistently conceived and expressed, and that the first alternative in Question B must be answered in the affirmative. The appellants have the advantage of a longer holding at the determined rent not increased till the end of the first five years of the pastoral lease, but not the advantage of holding on at the old rent. In this conclusion their Lordships agree with the Supreme Court. The appeal therefore must be dismissed, and with costs. They will humbly advise Her Majesty to that effect.

Solicitors for the appellants: *Bell, Brodrick & Gray.*
Solicitor for the respondent: *Randolph C. Want.*

[PRIVY COUNCIL.]

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Feb. 8, 16.

THE SUN FIRE OFFICE . . . . . DEFENDANT;

AND

HART AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL FOR THE WINDWARD ISLANDS.

Fire Insurance—Option of Insurers to terminate Policy on giving Notice—Construction of Condition—Practice—Costs.

A policy of insurance against fire was issued subject to the conditions, first, that it should not apply to any portion of the subject of insurance which should, by reason of some act done after its date without the consent of the insurers, be exposed to increased risk of fire, or removed to a building or place other than that described in the policy; second, that the insurers might terminate it by notice if "by reason of such change, or from any other cause whatever," they should desire to do so, refunding to the insured a rateable proportion of the premium for the unexpired time of the policy:—

Held, that the insurers had, by force of this condition, the option of terminating the policy at will.

Costs of successful appeal not ordered, being below the appealable value,

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* *Present:*—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR WILLIAM GROVE.

and special leave having been given on the ground that its decision was of general importance to insurance offices like that of the appellant.

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APPEAL from a judgment of the Court of Appeal (June 17, 1887) affirming a decision of the Court of Common Pleas for Barbadoes (March 28, 1887), discharging a rule nisi to set aside he verdict found for the respondents, and for a new trial on the ground of misdirection in an action upon a policy of fire insurance.

The facts are stated in the judgment of their Lordships.

Cohen, Q.C., and *Wood Hill*, for the appellant, contended that there was misdirection as to the meaning of clause 3 of the conditions, subject to which the policy sued upon had been granted. According to its true construction the policy was determinable at the will of the insurers. The words "from any other cause whatever," should be construed to include any cause which might influence the mind of a reasonable insurer. If the insurers' reasons were the proper subject of investigation by a Court of Justice, it would be for the jury and not the judge to determine whether the facts proved constituted such cause.

Reference was made to *International Life Insurance and Trust Company* v. *Franklin Fire Insurance and Trust Company* (1). As to the expression "from any other cause whatever," see *Dickson* v. *Doubleday* (2) and *The Queen* v. *Payne* (3).

The respondents did not appear.

The judgment of their Lordships was delivered by—

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Feb. 16.

LORD WATSON:—

The facts of this case are not in dispute, and may be shortly stated. On the 12th of May, 1885, Alice Creagh Hart, and five others interested, effected a policy of insurance with the Sun Fire Office, to run from its date until the 30th of July, 1886, on forty acres of sugar canes, uncut, situate on Fairfield Plantation, parish of St. Philip, Barbados. The policy was issued subject to

(1) 66 N. Y. Court of Appeals, 1876, 21 Sickels, 119.
(2) 30 L. J. (M. C.) p. 99. (3) Law Rep. 1 C. C. R. 27.

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the general conditions indorsed thereon, one of which was in these terms:—

"3. If after the risk has been undertaken by the society anything whereby the risk is increased be done to property thereby insured, or to, upon, or in any building thereby insured, or building or place in which property thereby insured is contained, or if any property thereby insured be removed from the building or place in which it is therein described as being contained, without in each and every of such cases the assent or sanction of the society, signified by endorsement thereon, the insurance as to the property affected thereby ceases to attach.

"If by reason of such change, or from any other cause whatever, the society or its agents should desire to terminate the insurance effected by the said policy, it shall be lawful for the society or its agents so to do, by notice to the insured, or to the authorized representatives of the insured, and to require the policy to be given up, for the purpose of being cancelled; provided that in any such case the society shall refund to the insured a rateable proportion, for the unexpired time thereof, of the premium received for the insurance."

There were three fires on the Fairfield Plantation in June, three in July, one in August, and another on the 25th of September, 1885, by which nearly twenty-three acres of canes were burnt. In August an anonymous letter was received by one of the insured, threatening continued incendiarism, and that letter was exhibited to the society's agent. On the 8th of October, 1885, the agent gave written notice in due form to the insured that, in consequence of these occurrences, the society terminated the policy from that date, in accordance with clause 3 of the general conditions; and he at the same time tendered repayment of £5 6*s.* 11*d.*, being the rateable proportion of the premium received for the unexpired term of the insurance. The insured refused to accept the sum tendered, or to give up the policy. The losses sustained through fires occurring before the 8th of October were adjusted and paid by the society. Two fires occurred after that date, the one upon the 20th of December, 1885, and the other upon the 30th of January, 1886.

The suit in which this appeal is taken was brought by the

insured for recovery of the damage occasioned by the fires last mentioned. In defence, the society relied solely on the effect of its notice of the 8th of October, 1885, as determining the policy, before either of the losses sued for was incurred. The action was tried in the Court of Common Pleas, at Princetown, on the 7th of March, 1887, before his Honour Isaac Richard Reece, Acting Chief Judge, and a special jury. The facts already stated were put in evidence; and the learned judge directed the jury to the effect that, the facts not being disputed, the question to be determined was one of law, and not of fact, and that he decided the law in favour of the plaintiffs. The learned judge ruled as matter of law:—(1) That the words "any other cause whatever," in the 3rd general condition, mean "any change of the same genus" as the changes previously specified, and that the facts in evidence did not amount to such changes in respect of the subject-matter of the suit; and (2) that, assuming the defendants' construction of the 3rd general condition to be correct, they were precluded from exercising their right to determine the policy, by reason of their having advisedly paid for no less than seven fires, in the full knowledge of the circumstances referred to in their notice of the 8th of October. The jury accordingly returned a verdict for the plaintiffs, and the Court gave the defendants leave to apply for a rule nisi for a new trial.

BENGAL SECRETARIAT LIBRARY.

The defendants obtained a rule to shew cause why the verdict should not be set aside, "and instead thereof a new trial granted between the parties," which was discharged by an order of the same judge who tried the action, dated the 23rd of March, 1887. His decision was thereafter affirmed by the Court of Appeal for the Windward Islands, consisting of three members, the Chief Justices of St. Lucia and Tobago, Grenada, and St. Vincent. It appears from the judgment of Trafford, J., Chief Justice of St. Vincent, that the defendants' counsel submitted three alternative constructions of the 3rd condition, (1) that it authorized the society to cancel the policy for any cause whatever; (2) that it authorized them to terminate the policy on any reasonable grounds; and (3) that, even on the ejusdem generis principle of construction, the facts proved shewed a material increase of risk,

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and justified their notice. On the other hand, the plaintiffs' counsel contended for the law as laid down at the trial.

Upon the first ruling, two members of the Court of Appeal, Gresham, J., Chief Justice of Grenada, and the Chief Justice of St. Vincent, agreed with the presiding Judge. Carrington, J., Chief Justice of St. Lucia and Tobago, differed, being of opinion that the jury ought to have been directed that the words "other cause whatever" would include any event or circumstance of such a character as to induce a desire on the part of a fair-minded and reasonable man to put an end to the policy; and that it was for the jury to say whether the reasons put forward by the defendants for terminating the insurance were, or whether any of them was, of such a character. Upon the second ruling the same learned judge held that the presiding judge was wrong in law. The Chief Justice of St. Vincent considered it unnecessary, in the view which he took of the first point, to deal with that part of the direction. The Chief Justice of Grenada concurred in the ruling, but on a different ground from that assigned by the presiding judge. He was of opinion that a letter of the defendants' agent, dated the 22nd of December, 1885, amounted to a waiver of their notice of the 8th of October. The letter contains nothing beyond a request that the insured will delay proceedings for the enforcement of certain claims which had arisen before the date of the notice, until the writer had an interview with an agent of the office who was expected from England; and it is difficult to understand how such a request could possibly imply an intention to depart from a notice which did not affect these claims, especially when the communication expressly bears to be "without prejudice, and without any intention of admitting any liability against the Sun Fire Office under the policy."

The third general condition of the policy consist of two branches which differ in their purpose and effect. The object of the first is not to void or terminate the policy, but to prevent its attaching to such portions of the subjects which it is framed to cover as may, by reason of some act done after its date, without the consent of the insurers, be exposed to increased risk of fire. The object of the second, with which we have to deal in the present case, is to enable the insurers to release themselves from their contract

during its currency, leaving it in full vigour down to the time of notice. The words in which the power of determination is expressed, taken by themselves, are very wide and comprehensive. According to their primary and natural meaning, they import that, in order to justify the exercise of the power, nothing is required except the existence of a desire, on the part of the insurers, to get rid of future liability, whether such desire be prompted by causes which prevent the policy attaching, or by any other cause whatever. That construction of the words, read apart from the preceding context, appears to have been accepted by the majority of the Court of Appeal. The Chief Justice of Grenada said, "It is impossible for words to be more general, and, if construed literally, any, the most absurd, construction could be put upon them." It can hardly be suggested that the literal construction of the words would go farther than giving the insurers the option of determining the policy at will; and the learned Chief Justice was apparently of opinion that it would go that length. So far their Lordships agree with him, but they are unable to concur in his view that such a construction would, in any aspect of it, be absurd. The condition does not involve the avoidance of the policy ab initio, or forfeiture of the premium paid by the insured. There may be many circumstances calculated to beget, in the mind of a fair and reasonable insurer, a strong desire to terminate the policy, which it would be inconvenient to state and difficult to prove; and it must not be forgotten that the whole business of fire insurance offices consists in the issue of policies, and that they have no inducement, and are not likely, to curtail their business, without sufficient cause. On the other hand, the insured gets all the protection which he pays for, and, when the policy is determined, can protect his own interests by effecting another insurance.

In two of the learned judgments delivered in the Appeal Court numerous authorities are referred to, which their Lordships forbear to notice, because they have really little or no bearing on the interpretation of the clause upon which the decision of this case must turn. It is a well known canon of construction, that where a particular enumeration is followed by such words as "or other," the latter expression ought, if not enlarged by the context,

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to be limited to matters ejusdem generis with those specially enumerated. The canon is attended with no difficulty, except in its application. Whether it applies at all, and if so, what effect should be given to it, must in every case depend upon the precise terms, subject-matter, and context of the clause under construction. In the present case it appears to their Lordships to be no room for its application. The theory upon which the ruling of the presiding judge and its affirmance by the majority of the Court of Appeal, proceeds, appears to be this, that the words "by reason of such change" are equivalent to an enumeration of certain particular changes or causes specified in the preceding condition; and that the following words "or from any cause whatever," must be confined to causes ejusdem generis with these. The antecedent context does not contain a mere specification of particulars, but the description of a complete genus, if not of two genera. The first of these is any and every act done to the insured property whereby the risk of fire is increased. Taking that as a particular, none of the learned judges has suggested what circumstances would constitute alia similia.

Their Lordships are accordingly of opinion that the condition must be read in the literal and natural sense of the language which the contracting parties have chosen to employ, and that it includes any and every cause which could reasonably induce an insurer to desire the termination of the policy.

The question remains whether the clause gives the insurers the right to act upon their own judgment, or whether they are bound, if so required, to allege and prove to the satisfaction of a judge or jury, not only that a desire exists on their part, but that they have reasonable grounds for entertaining it. If the determination of the policy would be for the advantage of its business, that would obviously be a reasonable ground for the office desiring to put an end to it; and à priori, one would suppose that the insurers themselves must be the best if not the only capable judges of what will benefit their business. An insurance office may deem it prudent, and resolve to limit its outstanding engagements, and, unless the words of the clause clearly imply the contrary, it cannot be presumed that the parties meant to make such a question of prudent administration the subject of inquiry in a

court of law. These and other considerations already adverted to, have led their Lordships to the conclusion that the sufficiency of the reasons moving them to desire the termination of the risk which they had undertaken is a matter of which the insurers are constituted the sole judges. That conclusion is not only supported by these considerations, but it appears to their Lordships to be in accordance with the natural construction of the language of the clause.

In regard to the second ruling of the presiding judge, and the opinion expressed by the Chief Justice of Grenada, with respect to waiver of the notice of the 8th of October, 1885, their Lordships do not think it necessary to say more than this, that they appear to be founded upon some misconception of the law.

The necessary legal result of their Lordships' opinion is that judgment ought to have been entered for the defendants, who are appellants here, at the trial of the cause. But the appellants, in the Court below, only moved for a new trial, and the judgment appealed from was given with reference to that motion. The case must therefore go back to the Court of Common Pleas for Barbadoes, in order that the proper order may be pronounced. Accordingly, their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, to make the rule nisi obtained by the appellants absolute, and to order the plaintiffs respondents to pay to the defendants appellants the costs incurred by them in the Court of Common Pleas and in the Court of Appeal. Seeing that this appeal was brought by special leave, being below appealable value, on the ground that its decision was of general importance to insurance offices, their Lordships think that there ought to be no order as to costs here.

Solicitors for appellants: *Dawes & Sons.*

[HOUSE OF LORDS.]

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Dec. 18.

ROBERT MACKILL AND OTHERS . . . APPELLANTS;

AND

WRIGHT BROTHERS & COMPANY . . RESPONDENTS.

Ship—Charterparty—Marginal Note—Guarantee as to Ship's Capacity—Stowage of Machinery and Coal.

By a charterparty made between the respondents and the appellants it was agreed that the appellants' vessel should proceed to Glasgow and there "load all such goods and merchandise as the charterers should tender alongside for shipment not exceeding what she could reasonably stow and carry, &c." It was provided that the freight should be a lump sum of £2200, and the charterparty contained this guarantee: "Owners guarantee that the vessel shall carry not less than 2000 tons dead weight," and this provision: "Should the vessel not carry the guaranteed dead weight as above any expenses incurred from this cause to be borne by the owners, and a pro ratâ reduction per ton to be made from the first payment of freight." The cargo intended to be carried was a general cargo consisting in part of railway locomotive machinery, and a note was by consent of the parties written upon the margin of the charterparty specifying the "largest pieces" of machinery which were to be included in the cargo by number, weight, and measurement. The charterers tendered a cargo not in excess of 2000 tons dead weight, consisting of railway machinery, including locomotives and tenders, two parcels of coals, and general goods. The large pieces of machinery were much more numerous than specified in the marginal note. The vessel sailed with only 1691 tons dead weight. It was not disputed that she contained a carrying capacity up to the guarantee; and it was admitted that 2000 tons dead weight of the cargo tendered could not have been carried on the vessel unless the coal had been packed with the machinery, which was not done. The charterers claimed a deduction in the freight:—

Held (reversing the decision of the Court of Session), that the marginal note amounted to a representation, and the cargo being such a cargo as was not contemplated, and the fact being that the vessel carried less than the guaranteed dead weight because the charterers tendered large machinery in excess of their representation, they were not entitled to the benefit of the stipulation for reduction of the freight, and the whole lump freight was payable:—

Held, also (affirming the opinion of the Court of Session), that the stowage of coal among machinery without the consent of the shippers of the machinery and of the coal was not proper stowage, and that it was the duty of the respondents and not the duty of the appellants to obtain such consent.

APPEAL from the Second Division of the Court of Session (1), Scotland.

(1) 14 Court Sess. Cas. 4th Series, 863.

By charterparty, dated the 28th of May, 1886, entered into on behalf of the appellants, Robert Mackill, and others, Glasgow, owners of the steamship *Lauderdale*, on the one part, and the respondents, Wright Brothers & Co., of London, as charterers, on the other part, it was agreed that the ship, then on a voyage, should proceed to Glasgow, and there "load all such goods and merchandise as the said charterers or their agents shall tender alongside for shipment, not exceeding what she can reasonably stow and carry over and above her tackle, &c." The whole vessel was to be at the disposal, except room for eighty tons extra bunker coal, of the charterers for the conveyance of goods. By the charterparty the "owners guarantee that the vessel shall carry not less than 2000 tons dead weight of cargo." The vessel when loaded was to proceed viâ Suez Canal to Kurrachee. It was provided that the freight should be a lump sum of £2200; and "should the vessel not carry the guaranteed dead weight as above any expense incurred from this cause to be borne by the owners and a pro ratâ reduction per ton to be made from the first payment of freight." The charterers were to have the option of ordering the vessel from Kurrachee to Bombay, or vice versâ, with part cargo, in which case the freight should be £2400.

On the side of the charterparty was written the following unsigned note: "Including machinery, the largest pieces measure about say:

10 pieces	25.10 × 9.6 × 4.5	and weighs	about	12	tons	12	cwt	each.
10 „	20.10 × 8.1 × 5.1	„	„	10	„	6	„	„
5 „	36. 0 × 3.1 × 1.0	„	„	6	„	3	„	„."

The charterers tendered a cargo of 2000 tons dead weight, which consisted of, inter alia, railway machinery, including locomotives (in pieces), tenders, engine turntables, and two parcels of coal of 100 tons and 370 tons respectively.

The vessel arrived at Glasgow, and having unloaded her inward cargo proceeded to the General Terminus Quay, where on the 10th of June, 1886, she loaded in the bottom of 3 and 4 holds the two parcels of coal, and subsequently, from different quays, took in the machinery and general cargo. On the loading of the vessel being completed it was found that only 1691 tons dead weight of cargo had been shipped.

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It was not disputed that the vessel contained carrying capacity for more than 2000 tons dead weight, or that that amount of cargo was supplied, but the appellants maintained that the short shipment was due to causes for which the respondents were responsible, and that the full freight was payable. The respondents contended that in any event the lump sum should suffer a deduction corresponding to the short shipment. In these circumstances the appellants raised this action for the balance unpaid amounting to about £451; of this sum the respondents admitted about £106 to be due. The only question was whether the respondents were entitled to a deduction for the freight.

In the proof adduced the respondents alleged and the appellants denied that it was proper stowage to stow coal among machinery, but this House held that to do so without the consent of the respective owners was not proper stowage. The other evidence given in the Court of Session is dealt with in the Law Peers' opinions. It substantially proved that the quantity of bulky machinery and awkward stowage tendered was much larger than specified in the marginal note: that some of the tender-frames were from 15 to 16 ft. long by 9 ft. broad and 6 ft. high, and were very slightly built, and that it was impossible not to have a waste of stowage with such a cargo, tendered as it was. The appellants denied that they understood the coal was to be packed among the machinery, and relied on two letters as shewing the intention of the respondents that the coal should go separately. One letter was dated 7th of June, 1886, from the respondents to Messrs. Niven & Co.: "As the coals we bought through you are for the bottom of the ship you had better arrange with Mr. Mackill to put them on board as soon as possible"; and the other letter was Messrs. Niven's reply, dated the 7th of June: "*Lauderdale.*—We have seen owners about the coals, and they are having them shipped on Wednesday, first." On the other hand, the respondents alleged that they intended the coal to go in the bottom of the ship in and around the machinery; but they admitted they sent no order to that effect to the stevedore. When the ship was partially loaded some discussion took place as to taking out some of the coal and placing it among the machinery, but the respondents did not

offer to bear this expense. It also appeared that the respondents, who were the owners of the parcel of coal of 370 tons, had sold those coals before they were shipped. Neither party asked the owners of the coal to allow it to be placed among the machinery. It was admitted that the eighty tons of extra bunker coal was placed on the top of railway machinery the day on which the vessel sailed. The stevedore was appointed by the respondents and paid by the appellants.

The Second Division of the Court of Session (1), on the 5th of July, 1887, adhering to the Lord Ordinary's (2) interlocutor (Lord-Rutherfurd Clark dissenting), gave judgment in favour of the respondents. The reasons of the Lord Justice Clerk and Lord Young are dealt with in the Law Peers' opinions; Lord Rutherfurd-Clark considered that a deduction could only be allowed either in the case of the shipowners not furnishing a ship of the requisite carrying capacity, or not loading a cargo which with proper stowage could be loaded up to 2000 tons; that no breach of the obligation in either respect had been committed by the shipowners, for they furnished a ship of the carrying capacity of 2000 tons and loaded all the cargo it was possible to load consistent with proper stowage, but that the charterer had not furnished a cargo which with proper stowage could be loaded to the extent of 2000 tons; the only condition on which that amount could have been loaded was that the machinery and coals should be stowed together; that that would have been improper stowage unless with the consent of the owners of the machinery and the owners of the coal, and that this consent ought to have been obtained by the charterers and furnished to the shipowners before either the machinery or coals were loaded.

On appeal.

1888. Nov. 13, 15. *Finlay*, Q.C., and *Leck*, for the appellants:—

The guarantee that the vessel will carry not less than 2000 tons is necessarily dependent upon a cargo being tendered which can be properly stowed, and the respondents tendered a cargo which could not be properly loaded. The machinery was materially

(1) 14 Court Sess. Cas. 4th Series, 863. (2) Lord Trayner.

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different from what was stipulated for in the marginal note. The Lord Ordinary held that it was for the shipowners to obtain permission to stow the coal amongst the machinery. The fact seems to be clear that coal is broken when stowed among machinery, and that shipowners will not stow coal in this manner without the consent of the shippers. It was therefore the duty of the respondents before either coals or machinery were loaded to furnish the appellants with proper evidence of the necessary consent, and this they failed to do. Secondly, the appellants' contention is that the coals were loaded in the bottom of the ship in accordance with the intention of the respondents: see letters of the 7th of June, 1886; and it appears to have been an afterthought that the coals should be placed among the machinery. The fact that a full cargo was not carried was therefore the fault of the respondents, and no deduction for the freight ought to be allowed.

J. Gorell Barnes, Q.C., and *W. S. Robson*, for the respondents:—

The appellants are liable. The respondents were no doubt bound to tender a cargo which could be loaded on board the ship: but of the nature of that ship they knew nothing, and there was nothing in the charterparty binding them to supply any particular cargo. What they did was to send a list of the cargo which they reasonably considered could be carried. The appellants knew their ship, and the list of the goods enabled them to calculate if the whole cargo could go; if it could not, then they ought to have told the respondents so at once, and they would have sent other cargo. They neither did this nor consulted with the respondents as to how the cargo was to be stowed. They have therefore failed to comply with the terms of the charterparty, and cannot justly say "we have lost the freight through the charterers." It is not the duty of the charterer to obtain the consent of the owners of the coal and of the machinery to stow them together; but in fact the respondents gave their consent to this being done. The marginal note is not a list of the whole of the large pieces, but the measurement of the largest pieces, and the respondents have complied with it, and have sent no pieces larger than those named.

Finlay, Q.C., in reply :—

The shipowner cannot form an estimate of the space to be occupied before such a cargo as this is placed on the vessel. The marginal note is at least a representation; but assuming it not in existence, the charterer is bound to tender a cargo which can be properly stowed. In *Pust* v. *Dowie* (1) Blackburn, J., said: It has been "contended that there is a warranty that the ship is capable of taking 1000 tons (the capacity there guaranteed) of goods in any proportion of weight and measurement which the freighter chooses to furnish. But that cannot be, for it would put the shipowner at the mercy of the freighter. When a ship is loaded, three things are to be considered: the ship is to be full, it is to be loaded so that it may sink to a proper depth, viz., that of the water-line, and so that the centre of gravity may be in the proper place in order that the ship may not roll or labour or be top-heavy. These objects can only be secured by certain proportions of heavy and light goods being loaded on board. And therefore the parties must be taken to have intended that the capacity of the ship should be to take 1000 tons weight and measurement in reasonable proportions;" and his Lordship continued: "When a shipowner says, 'My ship will carry 1000 tons weight and measurement,' I think that means that the ship is of a capacity to hold 1000 tons of weight and measurement goods, furnished in fair proportions of the ordinary and usual goods of the port of loading." Mellor, J., said: "The ship being of the capacity warranted, it is the default" of the freighter "that, having the option of loading the ship as he chooses, he has not made the ship fully available." The stipulation here is, that the ship is capable of carrying not less than 2000 tons dead weight, and the respondents cannot successfully contend that it has not carried such weight.

LORD HALSBURY, L.C.:—

My Lords, the question in this case arises on a charterparty dated the 28th of May, 1886.

The owners of the screw steamer *Lauderdale* (the appellants)

(1) 5 B. & S. at p. 31.

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and the charterers (the respondents) agreed upon the face of that document that the *Lauderdale*, then on a voyage, should proceed to Glasgow and there load all such goods and merchandise as the charterers or their agents should tender alongside for shipment. The whole of the vessel was to be at the disposal of the charterers except room for eighty tons extra bunker coal.

By the charterparty the owners guaranteed that the vessel should carry not less than 2000 tons dead weight of cargo. It was also further provided that a regular stevedore and clerks, as customary, to be appointed by the charterers, should be employed by the owners to stow and take account of the goods received on board.

The freight was to be a lump sum of £2200; and it was provided that should the vessel not carry the guaranteed dead weight as above, any expense incurred from this cause to be borne by the owners, and a pro ratâ reduction per ton to be made from the first payment of freight.

I have omitted to notice for the moment the marginal note upon the charterparty with which I propose to deal separately.

The vessel reached Glasgow on the 5th of June, 1886. The cargo included machinery consisting of locomotives and tenders, and two parcels of coal of 100 tons and 370 tons respectively. On the loading of the vessel being completed it was found that only 1691 tons of cargo had been shipped.

The respondents maintain that the appellants are responsible for the short shipment, and claim a deduction proportionate to the amount by which the cargo fell short of 2000 tons.

My Lords, I have very great difficulty in reconciling the somewhat divergent views of the learned judges below with the conclusion at which they have nevertheless arrived.

The Lord Ordinary in terms finds the owners' guarantee is subject to the implied condition that the charterers shall tender for shipment 2000 tons of cargo of such a description as could to that weight be stowed in the vessel.

His Lordship proceeds to decide against the shipowners apparently upon the ground that the coal should have been stowed as was customary among the machinery in holds 1 and 2, the size and character of the machinery making it inevitable that large

spaces would be left unoccupied in the holds where it was stowed.

His Lordship finds as a fact proved that it is quite customary to stow coals among heavy pieces of machinery—provided that the owners or shippers of both coals and machinery consent to this being done. But he further holds that without such consent it is not customary, and would be improper stowage, for the consequences of which the owners would be liable not only at common law, but also under the stipulations of the charter-party in question.

The Lord Ordinary's judgment assumes that—given the machinery which in fact the charterers tendered and the quantity of coal—it would be impossible properly to stow cargo up to the guaranteed amount; this, together with the implied limit which the learned judge places on the guarantee, would lead to a conclusion the opposite to that at which the learned judge arrived. But the argument which appears to have decided the learned judge's view is that the appellants were bound to obtain the consent of the owner of the machinery and of the coals, and as it is admitted they did not obtain it, he holds them liable.

My Lords, this seems to be a wholly novel principle, and one to which I cannot assent. The charterers are to tender the cargo, and if, as the Lord Ordinary says, the owners' guarantee is subject to the implied condition that the charterers should tender for shipment 2000 tons of cargo of such a description as could to that weight be stowed, it is obvious to ask from what part of this contract am I to infer an obligation upon the part of the shipowners to procure the consents of different owners to that which it is admitted but for such consent would be improper stowage.

My Lords, I am unable to agree, as I have said, with the judgment of the Lord Ordinary, but it is consistent with itself, and if the principle insisted on, namely, the obligation to procure the consents existed on the part of the owners, I should agree in the conclusion.

I am not so certain that I am able to follow the reasoning of the Lord Justice Clerk or Lord Young. I find the Lord Justice Clerk, describing the cargo, and giving his exposition of the true

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construction of the guarantee to be that it was a guarantee applying to the capacity and not to the actual fact, points out that the stevedore acting on his own responsibility put the machinery into one part of the hold of the vessel and the coals into the other. Unquestionably by so doing, he says, a good deal of space was occupied by the machinery which ought to have been occupied by ordinary cargo. His Lordship adds: "It appears that the coals might have been packed with the machinery, so as to fill up the interstices of space, but that it does not appear that there was any duty on the stevedore to do it." His Lordship thinks that there was no sufficient evidence that the stevedore did not do anything but what was reasonable and right in the stowage, and that such a stowage might be injurious both to the machinery and to the coal. I cannot reconcile this series of propositions.

I can only understand the learned judge's judgment on the view that the guarantee on its true construction is an absolute guarantee to carry 2000 tons of cargo of whatever kind the cargo may be, and that, inasmuch as in fact the cargo fell short of that amount the owners are responsible, such a construction gives no effect to the words "dead weight."

Lord Young, on the other hand, holds that if the cargo presented can only properly be stowed to the weight of 1600 odd tons, that does not shew the vessel is not of a guaranteed dead-weight carrying capacity, because, whatever the dead-weight carrying capacity of a ship may be, it is quite plain that it would not carry any cargo up to that weight. The area of a ship will not carry anything just up to that.

To this view I entirely assent. The guarantee is the dead-weight carrying capacity, and no one acquainted with ships or mercantile usage could suppose that such a guarantee would involve the obligation to carry any sort of cargo whatsoever up to the guaranteed amount. The guarantee is as to dead weight. But I so far agree with Lord Young that if it could be truly asserted that both parties were acquainted with the nature of the cargo that was to be carried, it would be unreasonable in construing a mercantile contract of this character not to suppose that both parties used the general language with reference to

the particular subject-matter as to which they were contracting, but I fail to see that the learned judge is justified in holding that this was an ordinary cargo "exactly such as was expected," namely, coals and machinery. I am not quite certain in what sense I am to understand the adverb "exactly," or in a later part of his judgment the words "the very cargo." It seems to me that a serious question would have arisen without the aid of the marginal note, which I have reserved for special treatment: whether the disproportionate excess of bulk over dead weight would not have been so unreasonable as it would not, according to the ordinary mercantile understanding of such a contract, have been a reasonable cargo. But the marginal note upon the charterparty, whether part of the contract or not, seems to me to free the question from all doubt. It certainly was information afforded to the shipowners for the purposes of the contract, and I think I may invert the terms of the judgment of Lord Young: the cargo tendered was not "the very cargo," nor "exactly" such as was expected. The bulk so far exceeded the proportion of dead weight as indicated by the marginal note in question that the cargo tendered was not all the cargo expected of and represented to be in the declared contemplation, and I think the reasoning of the learned judge should have led to an opposite conclusion.

My Lords, I only notice for the sake of dismissing a suggestion made in argument before your Lordships, but of which I cannot find any trace in the courts below, that there was some breach of duty by the shipowners in not informing the charterers as soon as it was ascertained that the ship could not carry to the guaranteed amount with the cargo then being loaded.

I doubt very much whether till the loading was completed, or nearly completed, the shipowners could in fact conjecture how far the loaded cargo would fall short, if at all, of the guaranteed amount, but if they could, it appears to me that those who are responsible for tendering the cargo should have themselves ascertained from time to time what would be the ultimate effect upon the carrying capacity of the vessel of the goods that they were entitled to tender and which it is manifest the shipowners would have no right to refuse. Such a claim is an entire novelty

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for which no authority whatever was advanced, and would certainly be imposing upon the shipowner a new liability recognised by neither lawyers nor merchants up to the present time. I agree entirely with the judgment of Lord Rutherfurd-Clark.

My Lords, under these circumstances I move your Lordships that the interlocutor appealed from be reversed.

LORD WATSON:—

My Lords, by the contract of affreightment upon which this action is laid the appellants guaranteed that their steamship, the *Lauderdale*, would, over and above eighty tons of extra bunker coal, "carry not less than 2000 tons dead weight of cargo." With reference to that warranty it was stipulated that, "should the vessel not carry the guaranteed weight as above, any expense incurred from this cause to be borne by the owners, and a pro ratâ reduction per ton to be made from the first payment of freight." The latter clause simply imports that, should the charterers furnish a suitable cargo, within the meaning of the guarantee, and the vessel prove incapable, with proper stowage, of fulfilling it, her owners must allow a deduction from the slump freight, proportioned to the tonnage of cargo short-shipped, together with the costs occasioned by their breach of contract.

The construction of the guarantee is attended with more difficulty. The appellants undertake, in common form, to load "all such goods and merchandise as the charterers or their agents shall tender alongside, not exceeding what the vessel can reasonably stow or carry." To hold that the terms in which that obligation is conceived are necessarily conclusive in determining the kind of cargo which comes within the scope of the guarantee, would, in my opinion, neither be consistent with mercantile usage, nor with the principles of the law merchant. Business men are in the habit of making shipping contracts in these general terms for the purposes of a particular adventure; and wherever it appears that the precise nature of the cargo which the charterers had it in their contemplation to ship was mutually understood, and was in the view of both parties at the time when they contracted, it becomes matter of reasonable inference that

such an obligation as is involved in the guarantee given by the appellants was meant to apply only to cargo of that description. Of course no such inference can be admitted when it is inconsistent with the express or implied conditions of the charterparty. But in cases like the present it is competent to investigate the whole facts and circumstances attendant upon the execution of the charterparty, with the view of ascertaining what particular kind of goods, if any, it was then in the contemplation of both parties should be shipped and carried, that being the cargo with reference to which it must be presumed, in the absence of express or implied stipulation to the contrary, that the guarantee was given and accepted.

There is really no conflict of evidence with respect to the mutual understanding of the parties to this appeal, before and at the time when they contracted, regarding the character of the cargo which it was then intended that they should respectively provide and carry. It was to be a general cargo, consisting in part of railway locomotive machinery, some portions of which occupy an extent of stowage room out of all proportion to their dead weight. During the same meeting at which the charterparty was signed (whether before or after signature does not clearly appear) a note, unauthenticated by their subscription or otherwise, was by consent of both parties written upon its margin, specifying the "largest pieces" of machinery which were to be included in the cargo by number, weight, and measurement. These, as described in the note, were to consist of twenty-three pieces in all, of which twenty appear to have required about 375 tons stowage space, calculated at 40 cubic feet per ton, with an aggregate dead weight of 209 tons. For the purposes of this case, it is not necessary to consider whether the note in question ought to be regarded as pars contractus, or as an unsigned jotting, because in either view it leads, practically, to the same legal result. Assuming it to be a mere memorandum, it nevertheless amounts to a distinct representation by the charterers that the appellants would not be required, under their guarantee, to carry more than twenty-three pieces of machinery of the size and character which it describes. That being the case, if the fact that the *Lauderdale* did actually stow and carry only 1690 tons

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dead weight of cargo was attributable to the respondents having sent forward large machinery in excess of their representation, their claim to a rateable deduction from freight is as effectually barred as if the representation had been embodied in the contract and made an express condition of the guarantee.

It appears from the evidence of the witnesses for the appellants that, over and above the twenty-three pieces specified in the marginal note, there were forwarded for shipment by the respondents, and carried by the *Lauderdale*, no less than sixty pieces of large machinery, of the same description, consisting of ten tenders and ten tender frames, weighing about four tons apiece, the other forty pieces each weighing from two to four tons. That extra machinery was an awkward species of cargo, and if stowed by itself was calculated to interfere seriously with the dead-weight carrying capacity of the ship. When so stowed, the tenders alone must, according to the estimates given by different witnesses, have occupied from 186 to 240 tons of measurement space, in excess of their dead weight. No attempt was made by the respondents to impugn that testimony, either on cross-examination or in their own evidence.

The respondents, in their statement of facts, allege that, in the list of machinery which they furnished to the appellants for their guidance in loading the vessel, there were included two parcels of 100 and 370 tons of coal respectively, which they intended to be "stowed in odd places beside and among the machinery and locomotives, so as to fill up the spaces between the large pieces, and utilise the ship's space to the best advantage." That was admittedly not done; but they say that it ought to have been done, in accordance with mercantile usage; and an examination of their record and evidence has satisfied me that they offer no other substantial excuse for having shipped large machinery in excess of their representation. Mr. William Wright, one of the partners of the respondents' firm, who went to the ship and found that the coals and machinery had been kept separate, says, "I was very much surprised at that, because I expected to see the coals stowed amongst the machinery. That was our intention when we ordered the coals;" and he adds that it is "invariably done." That was obviously the

intention and belief of the witness and of his firm; and, at the trial of the cause before the Lord Ordinary, they adduced no less than eight witnesses with the view of proving that the packing of coals amongst machinery is proper stowage. Unfortunately for the respondents, the testimony of their own witnesses disproves their contention. It merely comes to this, that when coals are stowed along with machinery not much harm is done to the latter, but the damage to the coals may be considerable; that coals are frequently stowed in that manner by special arrangement between the parties interested in ship and cargo; and that in such cases it is usual for the shipowner to allow a deduction from the freight of the coals, varying from 2*s.* to 3*s.* per ton, in order to cover damages. It is in vain to represent a practice of that kind, depending upon special agreement, as constituting a proper mercantile custom; and upon this point I agree with the learned judges in both courts below, who were all of opinion that loading coals amongst machinery is improper stowage.

By the charterparty the appellants are made responsible to all concerned for improper stowage; but it was suggested in the argument for the respondents, and it appears to have been strongly urged in the Court of Session, that it was the duty of the appellants to obtain permission from the respective owners of the machinery and coals to stow them together. The suggestion appears to me to be utterly unreasonable. I am of opinion, with Lord Rutherfurd-Clark, that the respondents, if they desired the stowage to be in accordance with their own views, were bound to obtain the requisite permissions from all interested, and to furnish these to the appellants before the proper time arrived for loading the machinery and coals. That they admittedly declined to do, and therefore the cargo must be held to have been properly stowed within the meaning of the contract of affreightment.

There is only one other argument addressed to us on behalf of the respondents which I think it necessary to notice. It was said that whenever it became known to those engaged in loading the ship that she could not, owing to the character of the goods sent forward, carry 2000 tons dead weight, they were bound to

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make an intimation to that effect, so as to give the respondents an opportunity of substituting other goods for the extra machinery. But the respondents were fully aware of the terms of their contract, and of the representation which they had made in regard to the larger machinery. In my apprehension, it was for them to consider what amount or description of cargo they would furnish. So long as the goods which they chose to send alongside were capable of being properly stowed and carried, without danger to the ship or her navigation, the appellants could not reject them on the ground that they were not of the precise description contemplated in the guarantee. The appellants might be thereby released, either in whole or in part, from their undertaking to carry 2000 tons dead weight; but they would not have been justified in refusing to carry any safe and otherwise suitable cargo which the charterers might find it possible or convenient to ship.

I have accordingly come to the conclusion that the so-called failure of the appellants to fulfil their guarantee was due, not to any act of theirs, but to the act of the respondents; and that the judgments appealed from must therefore be reversed.

LORD MACNAGHTEN:—

My Lords, the question turns upon the true construction of a charterparty in some respects peculiar. It is a charter for the hire of a vessel for a lump sum from Glasgow to Kurrachee. It has a note in the margin as to the description of part of the proposed cargo, and it contains this guarantee, "Owners guarantee that the vessel shall carry not less than 2000 tons dead weight of cargo." In effect, the charterers say to the owners, "We want a vessel to carry to Kurrachee a general cargo, including parcels of machinery; we give you the dimensions and number of the largest pieces; will your vessel carry 2000 tons dead weight?" The owners say "It will." That is, I think, something more than a mere guarantee of carrying capacity. It is a guarantee of the vessel's carrying capacity with reference to the contemplated voyage and the description of the cargo proposed to be shipped, so far as that description was made known to the owners.

It is not disputed that the *Lauderdale* possessed a carrying capacity of more than 2000 tons dead weight.

It is admitted that the *Lauderdale* did not, in fact, carry 2000 tons.

It is admitted that a cargo up to but not in excess of that weight, and consisting partly of machinery and partly of coal and other goods, was tendered by the charterers.

It is not disputed that the cargo so tendered could not have been carried on the *Lauderdale*, unless the coal had been packed with the machinery.

Though not admitted by the charterers, it is, I think, clear upon the evidence, and proved even by the testimony of the charterers' witnesses, that it is not proper stowage to pack machinery and coal together. The coal is invariably crushed and injured. The machinery generally suffers too, especially if the coal be damp or the machinery of delicate construction.

Further, it seems to me that the fair result of the evidence is, that in regard to the machinery which was tendered for shipment and shipped, the cargo was not such a cargo as was contemplated by the charterparty. It contained more large pieces; it was more bulky in comparison to its weight, and it was more awkward for stowage than the terms of the charterparty would naturally have led the owners to expect.

These being the material facts of the case, the clause in the charterparty on which the question turns remains to be considered. The charterparty has this provision:—"Should the vessel not carry the guaranteed dead weight, as above, any expense incurred from this cause to be borne by the owners, and a pro ratâ deduction per ton to be made from the first payment of freight."

What is the meaning of this provision? What is the event contemplated? Is it the case of the vessel (1) not actually carrying 2000 tons dead weight from any cause whatever; or (2) not carrying that weight from any cause not attributable to the charterers?

I think it would be unreasonable to read the provision as allowing abatement in the freight in every case of short weight. Such a construction would place the shipowners at the mercy of

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the charterers. They might fill the whole space at their disposal, and yet the cargo might be much under the contemplated weight, and so the shipowners would lose their full freight without any fault on their part.

I think that the provision was intended to have effect in the event of the vessel not carrying the specified weight, assuming the cargo tendered to be such a cargo as was contemplated by the charterparty, that is, an ordinary general cargo with a fair and reasonable proportion of machinery corresponding as to the largest pieces with the numbers, dimensions, and weights specified in the margin of the charterparty. In other words (to put it most favourably for the charterers), the provision was to come into effect in the event of the vessel not carrying 2000 tons dead weight from any cause not attributable to the charterers.

I think that the loss of cargo space and the short weight of the cargo carried on the *Lauderdale* were attributable to the charterers. It was their doing; I do not say it was their fault. They have committed no breach of the charterparty. They were not bound to load a full and complete cargo, and no blame, therefore, in the proper sense of the word attaches to them. But I do not think that they could take advantage of the stipulation for reduction of freight unless they tendered a cargo of the contemplated description and not in excess of the specified weight. They did tender a cargo of proper weight, but it was not of the contemplated description, and the result was that that cargo could only be stowed on board if stowed improperly. The charterers were at liberty to load the vessel with such goods as they pleased not inconsistent with the intention of the charterparty. They did not take the trouble to avail themselves of the whole space at their disposal. Why should the shipowners be fined for that?

I think that the charterers were altogether wrong in contending that the shipowners ought to have obtained the consent of the owners of the machinery and the consent of the owners of the coal to a method of stowage which would have been improper without the consent of both. I am unable to understand how any obligation of that sort could fall on the shipowners.

It was said that the shipowners placed some coal of their own,

for which space was reserved by the charterparty, among the machinery. But that does not prove that it was a proper thing to do. The observation seems to be matter of recrimination rather than argument.

It was urged by the learned counsel for the respondents that the charterers knew nothing about the vessel except what was told them in the charterparty. After the charter was signed they gave the shipowners in ample time a list of the goods they proposed to ship, specifying weight and dimensions. With this list before him the stevedore, it was said, had as good means of judging whether the whole 2000 tons could be shipped as if the goods had been arranged on the quay alongside. It was contended that the shipowners and the stevedore ought to have prepared a scheme for loading the vessel, and that when it was found that the whole quantity of cargo could not be shipped, the shipowners ought to have communicated with the charterers and given them an opportunity of altering or re-arranging the cargo. Now, that might have been a reasonable course for the owners to have taken; I say nothing to the contrary. But advice unsought is not always welcome, and I am not sure that if any such advice had been given to the charterers they would not have told the shipowners that it was their business to take the cargo and stow it the best way they could. Of course, the shipowners knew more about their vessel than the charterers. But the charterers ought to have known more about the cargo they proposed to ship. There is no evidence tending to shew that the vessel was of peculiar construction or different in any respect from what a charterer with the charterparty before him would have been led to expect. I cannot help adding that if the charterers really felt so much in the dark and so helpless as they are now represented to be, it would have been more natural for them to have consulted the shipowners and the stevedore than to have waited for advice, without giving any intimation that advice was expected or that advice would be well received.

Neither the appellants nor the respondents were, I think, conspicuously reasonable. But the respondents were the more unreasonable of the two, and, what is more to the purpose, I think

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they took a wrong view of the construction of the charterparty, and of their own position.

I therefore agree that the appeal ought to be allowed.

Interlocutors appealed from reversed with costs, and cause remitted to Court of Session with directions to give the appellants decree for the sum claimed by them, together with their expenses in the Court of Session.

Lords' Journals, 18th December, 1888.

Agents for the appellants: *Lowless & Co., for Webster, Will, & Ritchie, S.S.C., Edinburgh.*

Agents for the respondents: *Stibbard, Gibson & Co. for Boyd, Jameson, & Kelly, W.S., Leith.*

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HOOD AND ANOTHER . . . . . APPELLANTS;

AND

MURRAY AND OTHERS . . . . . RESPONDENTS.

Succession—Nearest of Kin—Vesting—Post-nuptial Contract—Proceeds of Sale of Heritage by Minor moveable or heritable—Moveable Succession (Scotland) Act (18 & 19 *Vict. c.* 23).

By post-nuptial contract, dated 1840, husband and wife conveyed their whole property (then consisting of moveables) each to the other in the event of his or her surviving, in liferent, and to their children in fee. The deed declared that the spouses reserved power severally to dispose of their respective estate by testament to take effect at the expiration of the liferent, "in the event of there being no children alive at the death of the predecessor, or dying in the lifetime of the survivor" of the spouses. A second declaration provided that in the same events and failing any such testament, then the whole estate "belonging or which may belong to the said husband shall fall to and become the property of his own nearest-of-kin;" a similar declaration provided as to the wife's property.

The husband purchased heritable estate in 1848, and died in 1858, without making any testamentary provision, survived by his widow and one child. This child died in 1863 of full age survived by an only son who was born in 1862. In 1877 the surviving spouse sold the heritable estate for £7500, executing a conveyance to the purchasers with the consent and

concurrence of her infant grandson, the price £7500 being handed to trustees to hold for those who should be found entitled under the post-nuptial contract. The infant grandson died in 1881 bequeathing any right he had to the £7500 to his grandmother. She died in 1885, disposing of the sum under her settlement:—

Held, reversing the decision of the Court of Session (14 Ct. Sess. Cas., 4th Series, 368), that the term nearest-of-kin described the person who filled that character at the date of the death of the husband, and not at the date of the death of the liferentrix, who was the son: and that the grandson's will passed the £7500, the sale of the heritage by him not having been challenged within the prescribed period:—

Per Lord Watson:—The legal meaning of nearest-of-kin since the Moveable Succession Act of 1855, is no longer equivalent to legal heirs in mobilibus.

Haldane's Trustees v. *Murphy* (9 Court Sess. Cas. 4th Series, 269) doubted.

APPEAL from a judgment of the First Division of the Court of Session, Scotland (1), pronounced upon a special case.

The facts set forth in the special case are shortly as follows: The late Dr. William Gregory and Mrs. Lisette Scott or Gregory, his wife, entered into a post-nuptial contract of marriage, dated the 25th of March, 1840, whereby they disponed each of them to the other in case of his or her survivancy, in liferent during all the days of the lifetime of such survivor, and to the children of their marriage in fee, the whole estate and effects, heritable and moveable, then belonging to either of them, or in which they then had any vested rights or interests, or which might pertain and belong, or become due or indebted to either of them during the subsistence of the marriage. Power was given to Dr. Gregory to apportion the fee among the children, and failing such division it was declared they should take share and share alike. It was further declared that in the event of the dissolution of the marriage by the predecessor of any of the spouses without leaving children, or the decease of all such children during the lifetime of the survivor of the said married parties, then it should be in the power of the said married parties severally to dispose by testament of the proper share of the funds, &c., belonging to them severally, but such disposition should not take effect until the decease of the longest liver of the said married parties, and

(1) 14 Court Sess. Cas. 4th Series, 368.

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failing any such disposition, "Then, and in that case, the whole funds and estate settled by these presents shall, after the decease of the longest liver of the said married parties, suffer division in manner after mentioned, that is to say, the whole funds and estate above mentioned belonging, or which may belong, to the said Dr. Gregory shall fall to and become the property of his own nearest of kin, and the whole funds and estate above mentioned belonging to, or which may belong, to the said Mrs. Lisette Scott or Gregory shall fall to and become the property of her own nearest of kin." There was no conveyance to trustees, but trustees were simply appointed to carry the provisions of contract into execution.

Dr. Gregory purchased in 1848 certain subjects in Princes Street, Edinburgh, at the price of £2275, and completed his title, by sasine and registration. These subjects belonged to Dr. Gregory at the time of his death, and were therefore included in the contract of marriage.

Dr. Gregory died on the 24th of April, 1858, survived by Mrs. Lisette Scott or Gregory, and by James Liebig Gregory, the only child of the marriage. Dr. Gregory left no testament dealing with heritable estate. Mrs. Lisette Scott or Gregory, upon the assumption that she was vested in the fee of the subjects in Princes Street, made up a title by an instrument recorded on the 21st of January, 1859, which proceeded upon the instrument of sasine in favour of Dr. Gregory and the post-nuptial contract of marriage.

James Liebig Gregory married on the 14th of September, 1861, and died on the 5th of May, 1863, survived by the only child of the marriage, Henry Makdougall John Fairfax Gregory, who was born on the 20th of November, 1862.

In 1877, Mrs. Lisette Scott or Gregory sold the subjects in Princes Street for £7500, but the purchasers raising the question whether she had anything more than a liferent, a minute of agreement was entered into in 1877, between Mrs. Lisette Scott or Gregory and Henry Makdougall John Fairfax Gregory (then a minor) of the first part, and the purchasers of the second part, by which the purchasers agreed to accept a conveyance from Mrs. Lisette Scott or Gregory, with the consent of Henry Mak-

dougall John Fairfax Gregory, for all interest he had or might have in the subjects, and by which it was provided that the £7500, the price of the subjects, should be lent to the purchasers on a bond and disposition in security over the subjects and certain other property; which bond and disposition in security should be granted in favour of certain trustees who should hold it for behoof of the parties having right to the subjects in terms of the post-nuptial contract of marriage. These several conveyances and declarations of trust were duly executed.

In May, 1881, the grandson H. M. J. F. Gregory made up a title to the subjects by a general service as heir to his father and grandfather. He died a minor, unmarried, 21st of June, 1881, leaving a general trust disposition dated 4th of June, 1881, by which he gave all right he had or might acquire to the said price of £7500 to his grandmother Mrs. Lisette Scott or Gregory, and directed the trustees acting under the declaration of trust to make over the same absolutely to her. By the same deed he left the whole of his moveable estate, except the £7500, to his mother. This disposition stated that Dr. Gregory had purchased the Princes Street subjects with money which belonged to his wife, but it has since been ascertained that was not the fact, but that these subjects were purchased with his own money.

Mrs. Lisette Scott or Gregory died on the 24th of May, 1885. By her will she left her whole estate heritable and moveable to trustees who were the appellants and second parties to the special case. They claimed the money, relying on H. M. J. F. Gregory's will, and on the ground that the nearest of kin were to be ascertained at Dr. Gregory's death.

The respondents were the fifth parties to the special case, and claimed as next of kin of Dr. Gregory, ascertained as at the death of Mrs. Lisette Scott or Gregory.

In the Court of Session, third and fourth parties also claimed the fund. The third parties were the heirs at law of Dr. Gregory and of H. M. J. F. Gregory, as at the death of Mrs. Lisette Scott or Gregory. The fourth parties were the trustees of Lieut.-Colonel F. W. Gregory, who was at the date of H. M. J. F. Gregory's death his heir at-law. Lieut.-Colonel F. W. Gregory died in 1884.

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The third, fourth, and fifth parties jointly contended that Mrs. Gregory only took a life interest, and that the vesting of the beneficial fee was suspended until her death.

The first parties were the trustees who held the money.

It was agreed that the expenses of all parties should come out of the fund.

The question of law put to the Court was: "To which of the parties hereto does the price of the said subjects belong?"

The parties agreed to confirm the sale, and to execute any deed necessary, but such confirmation was to be without prejudice to the rights of the parties inter se.

On the 21st of January, 1887, the First Division pronounced an interlocutor, declaring that the parties of the fifth part were entitled to the whole fund on the ground that the vesting of the fee of the estate was suspended until the death of the surviving spouse, and that it then vested (the issue of the marriage having predeceased) in the next of kin of Dr. Gregory as at the date of the death of the surviving spouse. They also held that the fund was moveable estate.

The second parties appealed, but the only other parties who appeared as respondents by counsel at the bar (1) were the parties of the fifth part.

1888. Dec. 4, 6. Sir *Horace Davey*, Q.C., and *A. G. Murray* (of the Scotch Bar), (*Haldane*, with them), for the Appellants:—

The decision of the Court of Session was wrong. The fee vested on the death of the husband in his nearest of kin; subject to divestiture in the events of there being any issue surviving the parents, or the husband leaving a will. Or, secondly, the fee was in the son, James, subject to defeasance—in the circum-

(1) After the hearing, and while the judgment was under consideration, the fourth parties, trustees of the heir-at-law of H. M. J. F. Gregory, petitioned for a re-hearing, or else for special leave to appeal in spite of the lapse of time; the cause of this application being some remarks which fell from the House during the argument in respect to whether the fund was now to be treated as heritable or moveable estate. But the Appeal Committee (Lord Halsbury, L.C., Lords Watson, FitzGerald, and Macnaghten), 14th December, 1888, refused the prayer of the petition. See Lord Watson's opinion, post, p. 138.

stances here, no doubt, in his own favour—on his dying in the lifetime of his parents. Or, alternatively, on the death of the husband the fiduciary fee remained in the wife; and on the succession opening to the "nearest of kin," the "nearest of kin" meant the nearest of kin at the husband's death. As to vesting, if the existence of the liferent be put aside, the power of disposition given to the husband might postpone vesting; but on his death without exercising the power that bar was removed: *Balderston* v. *Fulton* (1); *Ferrier* v. *Angus* (2). And a right may vest although the period of payment or distribution is postponed: *Carleton* v. *Thompson* (3); *Taylor* v. *Graham* (4). The first question to determine is the legal meaning in this deed of the term "nearest of kin;" but without a context shewing that a hypothetical class is meant, that term must be taken to mean nearest of kin at the death of the propositus: *Bullock* v. *Downes* (5); *Mortimore* v. *Mortimore* (6); *Urquhart* v. *Urquhart* (7); *Seifferth* v. *Badham* (8); *Balderston* v. *Fulton* (1); *Ferrier* v. *Angus* (2); see also *Snell's Trustees* v. *Morrison* (9); *Maxwell* v. *Wylie* (10). In *Young's Trustees* v. *Janes* (11) there was the necessary context; but the correctness of the decision in the later case of *Haldane's Trustees* v. *Murphy* (12) cited as *Wannop's Case*, is doubtful. The post-nuptial contract must be construed with reference to the law at its date—before the Moveable Succession (Scotland) Act of 1855 (13) and by that law the term "nearest of kin" meant heirs in mobilibus: Stair, 3, 8, 31. It is therefore submitted that the right to the property was, upon Dr. Gregory's death, in his son; that it was then carried to his infant son, and by that infant son's bequest to Mrs. Gregory, his grandmother, and borne thence to the Appellants.

(1) 19 Court Sess. Cas. 2nd Series, 293.
(2) 3 Court Sess. Cas. 4th Series, 396.
(3) Law Rep. 1 H. L., Sc. 232.
(4) 3 App. Cas. 1287.
(5) 9 H. L. C. 1.
(6) 4 App. Cas. 448.
(7) 13 Sim. 613.
(8) 9 Beav. 370.
(9) 4 Court Sess. Cas. 4th Series, 709.
(10) 15 Court Sess. Cas. 1st Series, 1005.
(11) 8 Court Sess. Cas. 4th Series, 242.
(12) 9 Court Sess. Cas. 4th Series, 269.
(13) 18 & 19 Vict. c. 23.

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Rigby, Q.C., and *A. Low* (of the Scotch Bar), for the Respondents:—

The cases of Bullock, and Mortimore, referred to the Statute of Distributions, but where the deed or will is silent as to the statute, different considerations arise; and it may be that the destination is a destination to a select class ascertained by description or character. The destination in this deed is to a select class, and, under such, succession is carried to those of the class who answer to the description or character at the period of distribution. The meaning of the term "nearest of kin" is to be gathered from the instrument: *Clapton* v. *Bulmer* (1) (per Lord Cottenham). The passage in Stair 3, 8, 31, is not a definition of all the "nearest of kin," as there appears to be other next of kin who do not represent the defunct. It is very difficult to agree with Lord Shand's view that the interest in the next of kin vested at once on the husband's death, but in any case it was a defeasible interest—defeasible if the husband made a will or if a child or children survived the surviving spouse; and therefore not transmissible pendente conditione: *Bell* v. *Cheape* (2); *Burden* v. *Smith* (3); and Lord Neaves said in *Balderston* v. *Fulton* (4) that conditional institutes are to be found at the period of distribution, see also *Stodart* v. *Stodart* (5).

[LORD WATSON:—*Bell* v. *Cheape* (2) was a mere spes ab intestato; and there is no foundation in the judgment of this House for the head-note in *Burden* v. *Smith* (3).]

The spouses cannot have intended that the child or children of the marriage should have the fee, and that then it should revert back to him, her, or them in their own default as next of kin; that would be a roundabout process.

It is submitted that the only period the spouses had in view in regulating the succession, was the date of the expiration of the liferent; and that the nearest of kin were to be ascertained at that period: see *Young* v. *Robertson* (6).

(1) 5 My. & Cr. 108; 10 Sim. 426.
(2) 7 Court Sess. Cas. 2nd Series, at pp. 633 and 634.
(3) 1 Pat. Ap. 214.
(4) 19 Court Sess. Cas. 2nd Series, at p. 295.
(5) 8 Court Sess. Cas. 3rd Series, 667.
(6) 4 Macq. 314.

Sir *Horace Davey*, Q.C., in reply:—

In Jarman on Wills (1) it is said: "The rule is established that next of kin means next of kin at the testator's death. The rule is equally applicable whether the Statute of Distributions is mentioned or not. See also Baggallay, L.J., in *Mortimer* v. *Slater* (2), Bell's Principles, sect. 1861; and *Ferrier* v. *Angus* (3). The object in making the devise in the form it is in is to let in the power of appointment. It cannot be seriously argued that if the husband had died without leaving any child, that the next of kin at his death would not have taken. Earl Cairns in *Miller* v. *Finlay's Trustees* (4) said: "Where you find interests given to a class, but the payments postponed for the purpose of letting in preceding life interests, the interests so given in remainder are vested immediately, and are not postponed until the time of payment." And his Lordship goes on to say that the construction does not depend on any technical rules either of feudal law or English conveyance, but on the ordinary construction of ordinary words and upon the plain consideration of the exigencies supposed to lead to the form in which the provision for a family is made.

The appellants contend this is money and not heritage, if their construction of the deed is correct. On that supposition at the date of the sale the fee was in James Gregory, subject only to his mother's life interest, and was carried to his son Henry who made up titles to his father and grandfather. Henry, by the law of Scotland, although a minor, could sell his heritable property subject only to the sale being challenged intra quadriennium utile; that not having been done the sale was perfectly valid, and passed the property to the purchasers; and the price under the minor's will. He cited *Brand* v. *Brand's Trustees* (5).

LORD WATSON:—

My Lords, this appeal depends upon the construction of a destination by the late Dr. William Gregory, which occurs in a

(1) Vol. ii., p. 137.

(2) 7 Ch. D., at p. 328, citing *Wharton* v. *Barker*, 4 K. & J. at p. 489.

(3) 3 Court Sess. Cas. 4th Series, 396, at p. 397.

(4) 2 Court Sess. Cas. 4th Series (H. L.), at p. 10.

(5) 2 Court Sess. Cas. 4th Series 258, and 1 App. Cas. 762.

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post-nuptial contract between him and the deceased Mrs. Lisette Scott or Gregory, executed in March, 1840. The spouses thereby conveyed, each to the other, in the event of his or her surviving, in liferent, and to the children of the marriage, in fee, certain funds and estate specially described, and in general, the whole estate, heritable and moveable, then belonging to them, or which might be acquired by them during the subsistence of the marriage. Power was given to Dr. Gregory to apportion the fee amongst the children; and, failing appointment by him, it was declared that they should take share and share alike. Two declarations are added, the first of which reserves power to the spouses severally to dispose of their own estate, by testament, to take effect at the death of the longest liver, in the events, either of there being no children of the marriage alive at the death of the predecessor, or of children then existing, but dying in the lifetime of the survivor. The second provides that, in the same events, and failing such disposition by will, the whole estates settled shall, on the expiry of the survivor's liferent, "Suffer division in manner after-mentioned, that is to say, the whole funds and estate above mentioned belonging, or which may belong, to the said Dr. William Gregory, shall fall to and become the property of his own nearest of kin; and the whole funds and estate above mentioned, belonging to, or which may belong to, the said Mrs. Lisette Scott or Gregory, shall fall to and become the property of her own nearest of kin."

Dr. Gregory died in 1858, survived by his widow and one child of their marriage, James Liebig Gregory, who died in 1863, leaving an infant son Henry, born in November, 1862. The estate specifically conveyed by Dr. Gregory consisted of moveables; but, in the year 1848, he purchased with his own funds (whether acquired before or after the date of the post-nuptial contract does not appear) certain heritable subjects in Princes Street, Edinburgh, at the price of £2275. The liferentrix, who had made up a title to these subjects upon the assumption that the deed of 1840 gave her a right of fee, sold them in 1877 for £7500. In consequence of objections taken by the purchasers to the validity of her title, an arrangement was come to, by which she executed a disposition in their favour, with the consent and

concurrence of her grandson Henry, then a minor (who subsequently expede a title through his father, James Liebig Gregory); and the price was invested in the names of three gentlemen, who granted a declaration of trust, acknowledging that they held the money as a surrogatum for the subjects sold, to be applied in terms of the destination and conditions in the post-nuptial contract. Henry Gregory died in 1881, unmarried, and in minority, leaving a settlement by which he bequeathed to his grandmother his whole right and interest in and to the trust fund of £7500.

Mrs. Gregory died in May, 1885, when the fund in question was claimed by various parties. In order to ascertain judicially which of them had the best right to it, a special case was presented to the Court of Session by (1) the trustees of the fund, who are mere stakeholders, (2) the testamentary trustees of Mrs. Gregory, (3) the heirs in heritage of Dr. Gregory, and also of Henry Gregory, as at the death of the liferentrix, (4) the representatives of the late Lieutenant-Colonel Gregory, who was the heir-at-law ab intestato of Henry Gregory, and (5) the next of kin of Dr. Gregory as at the time of his widow's death. A majority of the First Division, consisting of the Lord President (Inglis), with Lords Mure and Adam, dissentiente Lord Shand, by interlocutor dated the 21st of January, 1887, preferred the parties of the fifth part, who are the only respondents appearing in this appeal, the appellants being the trustees of Mrs. Gregory, the parties of the second part, who claim the fund as personal estate of Henry Gregory, which was carried to their author by his mortis causâ settlement.

The conveyance of Dr. Gregory's estate was, according to its terms, to take effect at his death; and there being a direct destination of the fee to children necessarily natis and not nascituris, I think it vested in James Liebig Gregory upon his father's decease. In considering the quality of the interest which then vested in him, the power reserved to Dr. Gregory to make another disposition of his estate, in the events which have since occurred, need not be taken into account. In *Balderston and Fulton* (1) it was held that the existence of such a power does not

(1) 19 Court Sess. Cas. 2nd Series, 293.

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impede vesting, and in the present case it was never exercised by Dr. Gregory, and expired with him. Whether James Liebig Gregory took a right of property absolute, or subject to defeasance, must depend upon the terms of the second declaration. He was the nearest of blood to his father, in both lines of succession, at the death of the latter in 1858; and, if he was also "nearest of kin" within the meaning of the deed, he became the absolute owner of the estate conveyed by Dr. Gregory. If, on the other hand, the words "nearest of kin" be taken to represent a class ascertainable at the death of the liferentrix, and therefore exclusive of the settlor's descendants, the fee which vested in him and his issue was subject to divestiture, and became divested by their failure in the lifetime of Mrs. Gregory.

So long as the old law governing the descent of personal estate remained unaltered, the term "nearest of kin," and equivalent expressions, were used to designate the class of blood-relations entitled to the moveable succession of an intestate. That succession belonged, as stated by Lord Stair (3, 8, 31), "to the nearest of kin, who are the defunct's whole agnates, male or female, being the kinsmen of the father's side, of the nearest degree, without primogeniture or right of representation; wherein those joined to the defunct by both bloods do exclude the agnates by one blood." In the common law of Scotland, next of kin and heirs in mobilibus meant one and the same thing; but another meaning might, of course, be impressed upon the term "next of kin," occurring in a written instrument, if the context shewed, either expressly or by reasonable implication, that the testator or settlor used it in a different sense. Thus, in *Connell* v. *Grierson* (1), where the succession to a landed estate, held under a deed of entail feudalized in 1782, devolved, in the year 1863, in terms of the ultimate substitution, upon the entailer's "own nearest of kin, and their heirs and assignees and disponees whomsoever," the Court, having regard to the whole tenor and objects of the deed, were of opinion that the entailer meant by these words to describe his nearest blood relation in the line of heritable succession, and they accordingly gave the estate to his heir of line, in preference to an agnate who was one degree

(1) 5 Court Sess. Cas. 3rd Series, 379.

nearer in blood. Again, in *Scott* v. *Scott* (1), a testator directed the residue of his trust estate to be paid over to his "nearest relations," and the Second Division held that the settlement contained sufficient indications of his intention to include in that term nephews and nieces of the half as well as of the full blood. In affirming the judgment the Lord Chancellor (Cranworth) (2) said: "If indeed the words of his will had been merely that the testator gave the residue to his 'nearest relations,' without more, no doubt the words would, according to the law of Scotland, mean those persons who would have taken in the event of his intestacy. But here the question is not who would take in the event of intestacy, because the testator has been his own interpreter of what he intended."

The Act 18 & 19 Vict. c. 23, altered the rule of moveable succession, by admitting representation among descendants, and, in the collateral line, among brothers and sisters and their descendants, and also by giving a share to the father, and, in the case of his predecease, to the mother of an intestate dying without issue. But the term "next of kin" is still used, in that statute, to denote those persons who would have been the legal heirs of the intestate under the old law; and it expressly reserves to them exclusive right to the office of executor, in competition with children or remoter descendants of persons who would have been next of kin, if they had survived the intestate. The effect which these enactments may have upon the significance of the words "nearest of kin" was recently discussed by the learned judges of the First Division in *Young's Trustees* v. *Janes* (3), but the circumstances of the case made it unnecessary to give any decision on the point. One thing is clear, that the expression is no longer equivalent to legal heirs in mobilibus, inasmuch as it does not include all the members of that class. It appears to me, however, that, in its legal sense, the expression is still applicable to those members of the class who would have been the sole heirs before the passing of the Act, and are now preferably entitled to administer the succession of the intestate. There may be a question whether, and how far, the surviving

(1) 14 Court Sess. Cas. 2nd Series, 1057.

(2) 2 Macq. 281.

(3) 8 Court Sess. Cas. 4th Series, 242.

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parent of a defunct ought to be regarded as one of his next of kin. Upon that point, which does not arise in this case, I express no opinion.

Of the three learned judges constituting the majority in the Court below, one only relies upon the case of *Wannop* v. *Murphy* (1), which was decided in 1881, by a bench of seven judges. Lord Adam, no doubt, considered himself bound by that decision, which, if well founded, appears to me to be a direct authority for the judgment now appealed from. In that case a testatrix, who died in 1877, directed her trustees to pay the whole income of the residue of her estate equally to and between her nieces A. and B. during their lifetime, and on their deaths to convey one half of the capital to the children of A., and the other half to the children of B., declaring that it should be in the power of the trustees to delay the division until the children attained the age of twenty-two, they receiving the free income in the meantime. In the event of A. and B. dying without issue, or of such issue predeceasing the last-mentioned period of division, the trustees were directed to pay and convey the residue to and among the truster's "own nearest heirs in moveables whomsoever, the division always being per stirpes and not per capita." A. and B. both died without having had issue. The Lord Justice Clerk (Moncreiff), with Lords Deas, Young, and Craighill, held, in these circumstances, (1.) That no interest vested in the heirs whatsoever of the testatrix before the period of distribution; and (2.) that these heirs were a class to be ascertained as at that period, and not as at her death, and decree was pronounced in accordance with their opinions. The Lord President (Inglis) and also Lords Mure and Shand, dissented from the judgment, being of opinion (1) that the residue vested, a morte testatoris, in the heirs called by the ultimate destination, subject to defeasance to the extent of one-half, in the event of A. having issue, and to the extent of the other half, in the event of B. having issue; and (2) that A. and B., the liferentrices, being among the heirs in mobilibus of the testatrix at the time of her death, each took a share of the capital, which passed to their representatives. Upon both these points I concur in

(1) 9 Court Sess. Cas. 4th Series, 269.

the opinion of the minority. I cannot reconcile the judgment of the majority upon the first point with the decision of this House in *Taylor and Gilbert* (1), and, upon the second, with its decisions in *Bullock* v. *Downes* (2), and *Mortimore* v. *Mortimore* (3). These last were not Scotch cases, but in neither did the judgment of the House proceed upon any specialty of English law; and the canon of construction which they recognise appears to me to be applicable to the language of a Scotch deed, which has not acquired technical significance, and falls to be construed according to the intention of the maker. The rule, as I understand it, is simply this, that in cases where a testator or settlor, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must primâ facie, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. In my opinion, the rule has no other effect than to attribute to the words used their natural and primary meaning, unless that meaning is displaced by the context.

In the present case, I do not think it necessary to consider what would have been the result of attributing to the expression "nearest of kin" the meaning which it may be taken to have borne since the Act of 1855 became law. The deed which we have to construe is not a will, which might be held to speak as at the decease of Dr. Gregory. So far as the interests of children of the marriage are concerned, it is, in substance as well as form, a mutual contract; and its pactional provisions must be construed now in the same sense in which they were understood by the contracting parties at the time of its execution in 1840. I cannot conceive that they meant the class whom they then preferred to vary with subsequent alterations in the law of intestacy. Their deed of contract contains no invocation of intestacy, in the proper sense of the word. Dr. Gregory's estate is not left to descend ab intestato; but the then existing law is referred to for the purpose of describing the persons who are to take

(1) 3 App. Cas. 1287. (2) 9 H. L. C. 1.
(3) 4 App. Cas. 488.

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provisione hominis. In these circumstances I am of opinion that his "nearest of kin," within the meaning of the deed, are the same person or persons to whom the law prevailing in 1840 would have assigned his intestate moveable succession at the time of his death in 1858. I can find nothing adverse to that interpretation of the deed, unless it be the suggestion that it is improbable the spouses should have intended to make a direct conveyance to their children and also to include them in the destination to their "nearest of kin." That is a kind of probability which has frequently been put forward without success in cases of this description; and, whenever it is, as here, unsupported by the context, it can only afford material for conjecture.

In the course of the argument, it was pointed out that, in the event of your Lordships holding that the subject of this litigation vested absolutely in James Liebig Gregory at the time of his father's death, that would re-open a question between the present appellants and the parties of the fourth part, who represent the heir of line of his son Henry. They claim upon the footing that the trust fund was heritable in the person of Henry, who died in minority, and did not pass by his will. They were called as respondents, but did not appear by counsel; and it was not against their interest that the interlocutor under appeal should be reversed. Had I not, on consideration, been of opinion that their claim is untenable, I should have thought it advisable either to give them an opportunity of being heard for their interest, before disposing of the appeal, or to remit the cause. But it has long been settled that a minor pubes can dispose of his heritable estate, with the effect of altering his succession, by an onerous contract of sale. It remains open to him, or to his heir-at-law, to set aside the transaction, intra quadriennium utile, on proving that it was to the enorm lesion of the minor. But the period limited for such challenge has run out, and the sale of 1877 is now as valid as if Henry Gregory had been of full age at the time. The terms of the trust, under which the price is still held, were intended for the protection of contingent interests which might be set up under the deed of 1840, and cannot affect the rights inter se of Henry Gregory's representatives.

For these reasons, I am of opinion that your Lordships ought to reverse the interlocutor appealed from, and to declare that the appellants, the parties of the second part, are entitled to the whole funds held in trust by the parties of the first part, and I move accordingly.

LORD HALSBURY, L.C., and LORD MACNAGHTEN entirely concurred.

Interlocutor so far as appealed from reversed, with a declaration that the parties of the second part are entitled to the whole funds held in trust by the parties of the first part.

Lords' Journals, 8th April 1889.

Agents for the appellants: *Lee & Pembertons, for Tods, Murray & Jamieson, W.S., Edinburgh.*

Agents for the respondents: *Hanbury, Hutton & Whitting, for J. S. & J. W. Fraser-Tytler, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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SCOTTISH DRAINAGE AND IMPROVEMENT COMPANY . . . . . } APPELLANTS;

AND

CAMPBELL . . . . . RESPONDENT.

Right in Security—Personal Action against Possessor of the Land—Private Act—Scottish Drainage and Improvement Companies Act, 1856 (19 & 20 *Vict. c. lxx*), *ss.* 52–61; 23 & 24 *Vict. c. clxx.*

By the Scottish Drainage and Improvement Company's Act, 1856 (19 & 20 Vict. c. lxx.), a company was incorporated for the purpose of advancing money for the improvement of land, the expenses of such improvement to be charged on the fee of the lands. By sect. 61 "every charge on land by virtue of this Act may be recovered by the company, or the person for the time being entitled to the same, by the same Means and in like Manner in all respects as any feu duties, or rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland."

Held, affirming the decision of the Court of Session (15 Court Sess. Cas.

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4th Series, 108), that it was not competent for the company to maintain a personal action against a landowner for the annual charge upon the land under the Act.

APPEAL from the First Division Court of Session, Scotland (1). The Scottish Drainage and Improvement Company was incorporated by the 19 & 20 Vict. c. lxx., amended by the 23 & 24 Vict. c. clxx., to advance money for the improvement of land by drainage and otherwise. In 1887 they instituted this action against the respondent, the incumbent of the parish of Urquhart in Inverness-shire, who resided in the manse and cultivated the glebe, for payment of instalments of certain rent-charges due since 1884. In 1880 the respondent was inducted as minister of the parish, and from that year to 1884 he paid the instalments claimed, but he alleged he had done so in error. The instalments were repayments of a sum of money, with interest, expended upon the glebe of the parish following upon applications made therefor by the respondent's predecessor in 1875–1877; and carried through under the sanction of the Inclosure Commissioners for England and Wales.

The documents constituting the grounds of the action are called absolute orders, made by the Inclosure Commissioners for England and Wales, under authority of the company's principal Act; and the charge in each is in terms of Schedule C appended to the Act. The first charge was in this form: "The Inclosure Commissioners for England and Wales in pursuance of the Scottish Drainage Company's Acts, do, by this absolute order under their hands and seal, charge the fee of the lands mentioned in the schedule annexed hereto, with payment to the Scottish Drainage and Improvement Company, their successors and assignees, of the yearly sum of £16 8*s.* 8*d.*, payable half-yearly on the 15th of May and the 11th of November in every year for the term of twenty-five years, and being a proportionate repayment according to the table annexed of the capital sum of £245 5*s.*, with interest at £4 10*s.* per centum per annum, the first half-yearly payment to be made on the 15th of May, 1878."

The appellants relied on their right to institute a personal

(1) 15 Court Sess. Cas. 4th Series, 108.

action, in preference to proceed by real diligence against the land, on the 61st section of the Act of 1856: "Every charge on land by virtue of this Act may be recovered by the company, or the person for the time being entitled to the same, by the same Means and in like Manner in all respects as any feu duties, or rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland" (1). The other material sections of the Acts of 1856 and 1860 are sufficiently given in the Law Peers' opinions.

The Lord Ordinary (Lord M'Laren) on the 15th of June, 1887, found the appellants had no personal claim against the respondent. This decision was adhered by the First Division on the 2nd of December, 1887; their Lordships construing the 61st section of the Act of 1856 as providing the means and manner of recovering the charge out of the lands.

On appeal,

June 21. *Asher*, Q.C. (of the Scotch Bar), (Sir *Horace Davey*, Q.C., with him), for the appellants:—

Sect. 61 of the Act of 1856 superadded to every remedy which a real burden gave against the lands a personal action against the respondent as landowner or occupier of the improved lands. For it was to be recovered as feu duties might be, and feu duties many be recovered by personal action against the vassal or intromitter: *Moncrieff* v. *Lady Balnagown* (2).

[He also commented on Bell Prin. sects. 697 to 700, and sect. 68 of Act 1856].

Rigby, Q.C., and *James Wallace* (of the Scotch Bar), for the respondent, were not called upon.

LORD HERSCHELL:—

My Lords, the only question that arises upon this appeal is whether the appellants can maintain a personal action against the respondent in respect of his occupation of certain land over

(1) See, for very similar words, sect. 35 of the Lands Improvement Drainage Act, 1846 (9 & 10 Vict. c. 101).

(2) Mor. Dict. 4185.

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which they have obtained a charge. That charge has been obtained by reason of an advance made in pursuance of the provisions of the Scottish Drainage and Improvement Company's Act, 1856, under which a limited owner is enabled to obtain an advance for the improvement of his land and, by pursuing the course there prescribed, to give a charge upon the land which binds it in the hands of his successors.

The 52nd section of the Act provides that "when the fee of any land is in pursuance of this Act charged with any money, the company shall be entitled to, and shall have from the time from which such rent-charge shall commence and take effect, a charge upon such land for the money ascertained and approved by the Commissioners as aforesaid," that is, the Inclosure Commissioners, whose assent must be obtained in order to create a valid charge under the Act. The section further provides that "such lands shall thenceforth be and continue liable to the payment of such charge," and it gives the charge priority, speaking generally, over all other charges. It, therefore, in terms not merely creates a charge upon the land, but provides that the land is to be liable for the payment of the charge. So far as that section is concerned it is obvious that there can be no question of the creation of any personal liability, and if that provision stood alone it is conceded on the part of the appellants that the only remedy of the drainage company must be by real diligence, that is to say, by proceeding according to Scotch law for the recovery of the payments to be made out of the land.

But the appellants place reliance upon the 61st section of the company's Act as giving them the right to enforce the liability personally which they claim by this action to enforce against the respondent. Before applying myself to the terms of that section, I desire to say that when an Act of this description is obtained by a company incorporated for purposes of profit, to confer upon them rights and powers which they would not have at common law, the provisions of such a statute must be somewhat jealously scrutinized, and I think that they ought not to be held to possess any right unless it be given in plain terms or arises as a necessary inference from the language used. The 61st section does not in terms create any personal liability. The appellants seek

to infer that liability solely from the nature of the remedy which that section gives to the company. The section provides that "every charge on land by virtue of this Act may be recovered by the company" "by the same Means and in like Manner in all respects as any feu duties, or rent, or annual rent or other payment out of the same lands would be recoverable in Scotland." Now it is said that that provision was unnecessary if the only effect of it was to enable the appellants to enforce a charge by real diligence. My Lords, I do not stop to inquire whether that view be correct or not. I think it is only natural, even if the Court would have inferred such a right from the mere creation of the charge, that the right should be given in express terms when you were creating a charge of this peculiar character, a charge which was created pursuant to these statutory provisions. However that may be, I think it clear that the language of this section is, at least primarily, directed to the mode of recovering the charge itself out of the land.

The contention of the appellants rested mainly upon the provision relating to the recovery of feu duties. It was said that feu duties are recoverable not only by real diligence but also by a personal action against the original vassal or against any person who subsequently comes into occupation of the land in terms of the feu charter, and that inasmuch as this section provided that the charge might be recovered "by the same Means and in like Manner in all respects as any feu duties out of the same lands," that by implication must mean that the same kind of personal action which the superior would have against any person in occupation as his vassal was intended by this Act to be possessed by the drainage company against the person in occupation of the land over which the charge was created.

Now, my Lords, I think that the language of the Act does not necessarily, and does not even naturally, bear such a construction. It is obvious that the words "feu duties, or rent, or annual rent or other payment out of the same lands" are all coupled together, and the use of the word "other" before the word "payment" indicates clearly that the legislature is speaking of "feu duties, or rent, or annual rent" in relation to their being "payments out of the land." They are bound together by that common character

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that they are all obligations for payment out of the land, and it is only in so far as they are payments out of or would be recoverable as payments out of "the same lands" that they are made recoverable in the case of this particular charge; because they are to be recoverable by the same means and in like manner in all respects as feu duties or other payments out of the same lands. And what is made recoverable? The provision in respect of recovery has relation to a "charge on land." It is only in respect of its being a charge that it is made recoverable in the same way as feu duties or other payments out of the land.

My Lords, those words are perfectly apt to confer upon the company, for the enforcement of that charge to which the land has been in terms rendered liable, every mode of recovery, every mode of real diligence, which was open for the enforcement of any of these other payments which were charges upon the land in respect of their being payments out of the land. Is it possible to say that beyond those rights there has been conferred upon the company a right to enforce a personal liability? No doubt personal liability may be enforced, as regards feu duties, not only against the original vassal but also any occupier taking subsequently under the feu charter. But if such a liability be enforceable, it does not arise by reason of the charge upon the land, it is not a mode of enforcing the payment out of the land, but it is a mode of enforcing a personal obligation which comes into existence owing to the creation of the relation of superior and vassal, or, it may be said, owing to the covenant for payment which arises from the original feu charter running with the land, and passing to the person who afterwards takes the land from the original vassal. In whatever light it is to be regarded, that certainly is the enforcement either of a contractual or of a quasi contractual obligation. Now here there is no such original liability created at all in respect of the payment—it is never made anything except a charge upon the land; and there is certainly no such relation created between the drainage company and the occupier from time to time of the land, as is created between the feuar and his vassal, or the person representing the feuar and any subsequent vassal.

My Lords, I have dealt principally with the words "feu

duties," which are here used, because those were most relied upon by the learned counsel for the appellants; but I do not think that the other words render the case any stronger in the direction of his contention. On the contrary, as was pointed out by Lord M'Laren, if you are to regard these words as implying personal liability, the person who would become upon the death of an occupier liable to these payments would not in all cases be the same (1). In the case of rent it might be the executor, in the case of feu duty the successor; and consequently you would be involved in very considerable difficulties if you were to say that this clause, which only relates to the mode of recovery, also determines the person against whom the recovery is to be had; because the contention of the appellants is and must be not merely that this section in effect says that there shall be a personal action in respect of this liability, but that it also determines against whom that personal action can be maintained, namely, against the person in occupation in succession to the original occupier, the occupier for the time being.

Therefore, my Lords, upon the construction of sect. 61, I am unable to find anything which by necessary inference confers upon the company a right which undoubtedly is not conferred upon them anywhere in terms, or creates a personal liability which undoubtedly there is no language expressly to create.

My Lords, certain other sections of the Act were relied upon by the learned counsel for the appellants as throwing light upon the section with which I have been dealing—those were principally sects. 68 and 69. The 68th section contains a provision in the first instance dealing with the liability to this charge as between persons becoming in succession entitled to the land upon which the charge is created; and then it has a proviso, I admit, of a somewhat singular character: "Provided that any such person entitled to succeed and becoming entitled in possession, shall not be liable to pay any arrears of the charge remaining unpaid at the time of his succession or right to succeed exceeding the amount of one year's payment of such charge." Now, it is said that this, by implication, shews that the person succeeding was to be personally liable to one year's

(1) 15 Court Sess. Cas. 4th Series, note at p. 110.

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arrears. It was admitted that if you were to take the analogy of feu duties the successor would not be liable to the arrears in any personal action. There is no creation, in terms, of such liability. The argument was this—you must infer from these words that the legislature created a liability even as to one year's arrears, and therefore it could hardly be supposed that it was not intended by the other section to make the successor liable in respect of his occupation of the land for payments which became due during the time of his occupation. My Lords, whatever may be the meaning of this section, such an argument appears to me to be somewhat far-fetched. It cannot be put higher than this—that if that construction be correct it would render it probable that the legislature would have made a provision creating a personal liability. We cannot from any such suggestion of probability come to the conclusion that a right has been given and a liability imposed which we do not find in the words which are said to create or impose it.

Then the 69th section undoubtedly speaks of "the person for the time being bound to pay the yearly or other periodical payments of such charge." I say again, with regard to that, that it is not possible, whatever may be the meaning of those words, and however they may have come to be used, to derive from them such assistance in construing the other section as to find in it the imposition of a liability which the words are not, I think, apt to create.

My Lords, there is one other provision, to which I drew attention in the course of the argument, which I think is not without importance. By the 59th section of the original Act it is provided that, "if any charge payable under this Act to the company shall be in arrear the same shall not bear interest for a longer period than six months," but that it shall for that period bear interest at the rate of 5 per cent. per annum. By the later Act amending the company's original Act, namely the Act of 1860, that provision was modified to this extent, that if there were not upon the land charged sufficient to answer and satisfy the arrears and interest for the period of six calendar months, then the arrears should continue to bear interest at the rate of 5 per cent. until payment or satisfaction, and such interest might be recovered

in the same manner as the sum in arrear. Now, if the only remedy were against the land, that provision would be perfectly intelligible, and by no means unreasonable; but looking at the provisions in the earlier Act and its manifest purpose, it seems to me that it would be very strange if, because there was not enough upon the land to enable the company to enforce to the full extent their charge, they should therefore be allowed to permit the payments to run into arrear, and interest on these arrears to run, enforceable (interest as well as arrears) at any subsequent time, at all events until barred by some Statute of Limitations, against the occupier of the land. I think, therefore, that this points in the opposite direction. I do not lay great stress upon it, but looking at the other parts of the Act as well as sect. 61, it certainly appears to me that they do not all point in the same direction, and that the safer course is to limit ourselves really to the interpretation of the only section which it can be contended confers the right which the appellants are now seeking to enforce.

Upon these grounds, my Lords, I think that the judgment of the Court below was right, and I move your Lordships that this appeal be dismissed with costs.

LORD WATSON:—

My Lords, notwithstanding the able and ingenious argument of Mr. Asher, I have been unable to discover any good ground for disturbing the judgment of the Court below.

There are two sets of clauses in these statutes which require to be attended to, the first constituting as a debt the money advanced by the company for the purpose of drainage or improvements; and the second prescribing the remedies by which that debt is to be recovered by the company. As to the construction of the first set of clauses there is no controversy—their terms are perfectly plain—they declare the money advanced in terms of the Act to be a charge upon the estate, and raise no personal liability either against the representatives of the original borrower or against his successor in the lands drained or improved. The controversy is confined to the 61st section of the statute. It is said that the effect of that clause is to attach to

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the debitum fundi not only the remedies which are ordinarily competent by the law of Scotland in such a case, but also the remedies which are applicable to a mere personal debt.

Now I think that, in construing the clause, it is necessary to keep in view the fact that a personal action is not an action for the recovery of a charge upon land. It is a misnomer, a contradiction in terms, to say that a creditor is recovering a charge upon land when he brings a personal action of debt for the purpose of obtaining a decree under which he can recover payment out of any part of the debtor's estate, or (at the time when these Acts were passed) by his incarceration. In the same way, a sum recovered under a personal contract or obligation is in no sense a sum recovered out of land or a payment out of land. So also in the case of a feu duty. When the superior sues on the express personal contract which is contained in the writs constituting the feudal relation between him and his vassal, he does not seek to attach the land or the accessories of the land. The same is true of "rent or annual rent," when in addition to its being made a charge upon the land it is matter of personal stipulation between the parties that the executors or successors of the owner or landlord shall be liable.

It is unnecessary for me, after the observations which have been made by the noble and learned Lord in the chair, to say anything further upon the terms of the 61st clause. I may say in a single word that the only remedies which it appears to me to give to the company are the remedies applicable to feu duties, rent, and annual rent, in so far as these are charges upon land or payments out of land, and not in so far as they are matters of personal contract.

LORD FITZGERALD:—

My Lords, at the close of the address of Mr. Asher I was in considerable doubt, possibly created by an impression that the pursuers ought to have judgment on the merits. There is no doubt as to the existence of the debt; there is no doubt as to its being a charge upon the land; and there is no question that the present incumbent of the parish, who has succeeded to the reverend gentleman who procured this loan, is in possession of the thing

charged and in receipt of the rents and profits. It did seem to me at first to be a very strong thing to say that the company should have no personal remedy against this present incumbent (in respect of the profits he has received) but must resort to the land and the land only. However, we are dealing now not with a public but a private Act of Parliament, and I have always understood, with reference to private Acts as contradistinguished from public Acts of Parliament, that if a charge is imposed upon the person of an individual it must be so imposed in clear and express terms and not left to implication.

My Lords, the original Act of 1856 seems to have been prepared with very considerable care, and I would say with a due regard to the rights and interest of others. But, after all, the language of this Act is the language of the drainage company. I presume they had no opponents. The Act presents the language of the company and of the company alone.

Now, it has been already observed that all through this Act until you come to the 61st section there is no doubt that the legislature is dealing only with a charge upon land, a real security, which by no means imports a personal obligation. One may further observe, too, that before a loan under this Act of Parliament is sanctioned an inquiry is made, and it is only sanctioned by the commissioners when they are satisfied that there is to be a permanent and real improvement of the land commensurate with the sum to be advanced, and with the annuity with which the land would thereupon become charged.

The Act being for the improvement and reclamation of land deals with public improvements as well as private improvements, and as to some of the classes of improvements it would be exceedingly difficult either to import a personal obligation, or to ascertain against whom it was to be enforced. I may refer for instance to the 4th section of the Act, and to the 12th class of improvements referred to in it, namely, "The construction or improvement of jetties or landing-places on the sea coast or on the banks of navigable rivers or lakes, for the transport of cattle, sheep, or other agricultural stock and produce." It would appear to me in reference to these words that it would be difficult to ascertain where the personal responsibility could rest if it was

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intended to be imposed. But proceeding further on we find that the company is to be incorporated. What powers is the company to have? Such powers and authorities as by this Act are granted and none other.

The provisional contract deals with the sum to be charged as an improvement loan on such land" (sect. 33); and the charging section (sect. 49) makes it a charge on the fee of the land and to take effect as such charge, and so far no allusion is made to any personal liability save in sect. 37, but that section, so far from importing any personal liability beyond its express provision, seems to me to negative it, for according to that section, "the Inclosure Commissioners may require security by bond or otherwise" from the parties making the application, for the payment of the expenses; and if they do not grant a provisional order, "such payment shall be made by such landowner or by the company, and shall not be a charge on the land to which such application relates." That provision dealing with personal liability does not support the contention of the pursuers.

If there was nothing further in the statute, it is clear that the party would be left to the enforcement of his charge upon the land and that alone. Possibly he would have been in a better position without the aid of sect. 61, for then the law might step it and provide him with some adequate remedy if it were not given by the Act. But sect. 61 gives a remedy, and when a remedy is given by an Act of Parliament of this kind you must pursue that remedy.

Then, referring to sect. 61, upon which the argument principally turned, what does it do? The thing to be recovered, with which it deals, is a "charge on land by virtue of this Act." It provides for the means and manner by which that liability of the land may be enforced, but it uses no words or terms whatever to indicate that any mere personal liability is cast on either the landowner or his successor in title or in occupation, or that he shall be liable in respect of or to the extent of profits received. Two things are referred to, the charge on the lands and the recovery of it out of the same lands, which is to be "by the same Means and in like Manner in all respects as any feu duties or

rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland."

We were very much pressed by Mr. Asher with this argument, that the 61st section did refer to an action "in like Manner in all respects as any feu duties" might be recovered by; and he called our attention to this circumstance, that in certain instances feu duties were recoverable by what might be termed a personal action. But that was only in cases in which the superior sued upon the obligation of an express contract of the vassal for the payment of the feu duty. I do not mean to say that the original contract between the company and the applicant might not possibly have been so framed as to give them a right to resort to his personal security. I express no opinion upon that, but I observe that in this case there is nothing urged in the summons or its conclusions to shew any personal liability in respect of contract or in respect of the receipt of rents or profits of the land.

My Lords, my noble and learned friend in the chair has referred to sect. 68, but that section creates no real difficulty, for it only determines as between the landowner and his successor their respective rights; and if his successor should be compelled, in respect of the land, to pay "one year's payment of such charge" in arrear, which his predecessor ought to have paid, then he has a personal right to recover it from his predecessor.

My Lords, after four years' trial of this Act of Parliament there came an amending Act; and there are some provisions in the amending Act which are deserving of observation. Sect. 4 contains the same definition of improvements or even a larger one than had been in the original Act, and the 13th sub-section of that section is applicable to "the construction or improvement of jetties or landing places on the sea-coast or on the banks of navigable rivers or lakes." Then, by sect. 11, when the land to which the application for a provisional order relates is land held in right of any church, the advance cannot be made without the consent of the presbytery of the bounds and the patron of the benefice. Sect. 13, which is not unimportant, provides for fire insurance. Where any farmhouses, farm buildings, or works susceptible of damage by fire have been erected, improved, or

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added to" under these Acts, fire insurance is to be effected—"the person for the time being bound to make the yearly or other periodical payments of such charge shall insure and keep insured against damage by fire all such farmhouses" and so on, and in the event of his not doing so "it shall be lawful for the company, with the assent of the Inclosure Commissioners to insure against damage by fire the said farmhouses, farm buildings and works in an amount not exceeding the principal amount originally secured by such charge"—the company may pay the premium, and he is bound to "repay to the company" (and here a personal right is given) "any sums so paid by them" in respect of premiums on fire insurance.

Now when we are dealing with this amending Act it is not unworthy of observation that the only reference in it to any personal obligation is the obligation to keep up the fire insurance premium, and if that is not done by the person in possession the company may pay it, and then, and then only, they have a personal right to sue, not for the charge, but for the sum paid in respect of fire insurance.

My Lords, both these Acts of Parliament were no doubt very beneficial for their purposes; they gave a security charged only upon the land without any words which would import a personal obligation either upon the part of the original borrower or of the landowner in succession, or, in the case of an advance upon glebe land, which would make either the original incumbent or the next incumbent personally liable. Whilst I feel coerced to agree with the motion which is to be presently put from the chair that the decision of the Court below be affirmed, I do so somewhat unwillingly. If there is any property which would require for improvement purposes the aid of an advance of money upon such easy terms as are provided by this Act, it would be such property as glebe lands and residences. I presume that this case is not defended by the present respondent merely in his own interest—probably he may be supposed to represent the interests of a large class; and I see this very clearly, that after the decision of this appeal it will be difficult, if not impracticable, to obtain from the drainage company advances of money upon such a security as the present.

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My Lords, I concur in the judgment which has been proposed, affirming the decision of the Court of Session and dismissing the appeal.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 24th June, 1889.

Agents for appellants: *Grahames, Currey, & Spens, for Ronald & Ritchie, S.S.C., Edinburgh.*

Agent for respondent: *John Graham, for Menzies, Coventry, & Black, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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April 8.

THOMAS CHRISTOPHER COWPER ESSEX APPELLANT;

AND

THE LOCAL BOARD FOR THE DISTRICT OF ACTON IN THE COUNTY OF MIDDLESEX . . . . . RESPONDENTS.

Lands Clauses Acts—Lands Clauses Consolidation Act 1845 (8 & 9 *Vict. c.* 18) *ss.* 49, 63—*Compensation for "injuriously affecting" other Lands—Severance of Lands—Damage by exercise of Statutory Powers—Nuisance—Part of Building Estate taken for Sewage Works—Value of other Parts thereby depreciated—"Lands held therewith."*

Under statutory powers incorporating the Lands Clauses Consolidation Act 1845 the respondents gave the appellant notice to treat for the purchase of part of his land, which they required for sewage works. In an inquisition held under that Act evidence was given that the existence of sewage works, even if conducted so as not to create an actionable nuisance, depreciated the market value of the appellant's other lands for building purposes. The land taken was let on long building leases; of the other lands part was in hand, and part was let for short periods for brick-making. The land taken was separated from the other lands, in part by other property of the appellant's, and in part by a railway. The jury gave a verdict for the value of the land taken and a further sum for all damage sustained or to be sustained by reason of the injuriously affecting the other lands by the exercise of the respondents' statutory powers:—

Held, that the jury had not exceeded their jurisdiction in awarding the further sum. For, first, part of the appellant's land having been taken for the sewage works, compensation might be awarded for damage to be

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sustained by reason of the injuriously affecting his other lands, not only by the construction of the sewage works but by their use;

Secondly, the damage was not too remote to form the subject of compensation, even though no nuisance might be caused;

Thirdly, the lands taken and the lands injuriously affected being held by the same owner so that the unity of ownership conduced to the advantage of the property as one holding, the lands injuriously affected were "held with" the lands taken within the meaning of sect. 49 of the Lands Clauses Consolidation Act 1845.

The decision of the Court of Appeal (*Reg.* v. *Essex*, 17 Q. B. D. 447) reversed, and the decision of Mathew and Day JJ. (14 Q. B. D. 753) restored.

In re Stockport, Timperley and Altrincham Ry. Co. (33 L. J. (Q.B.) 251) approved.

By Lord Watson:—Where several pieces of land owned by the same person are, though not adjoining, so near to each other and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Lands Clauses Consolidation Act 1845 ss. 49, 63; so that if one piece is compulsorily taken and converted to uses which depreciate the value of the rest the owner has a right to compensation for the depreciation.

APPEAL from a decision of the Court of Appeal (1).

Under statutory powers and under the Lands Clauses Consolidation Act 1845 the local board for the district of Acton gave the appellant notice to treat for the purchase of about five acres of his land at Acton, for the purpose of providing for the sewerage and the disposal and utilization of the sewage of the district and the necessary works connected therewith, and as to the compensation to be made for the damage which might be sustained by the appellant by reason of the execution of the works.

At the inquisition held before the under-sheriff of Middlesex and a jury in July 1884 the appellant claimed for the value of the land taken and also in respect of other lands belonging to him which, it was alleged, would be "injuriously affected" by the sewage works. The land taken was part of an estate laid out for building and was let on long building leases. The other lands alleged to be injuriously affected consisted of about thirty acres. Part of these thirty acres were in hand; other parts were let for short terms of years for brickmaking, with power to resume possession as each acre of brick earth was worked out. Of these thirty acres part was separated from the land taken by

(1) 17 Q. B. D. 447.

other land of the appellant's in respect of which no compensation was claimed, and the rest by a railway.

Evidence was given that the existence of sewage works, even though conducted so as not to create an actionable nuisance, depreciated the market value of neighbouring land for building purposes.

The jury gave a verdict for the sum of £8737 for the purchase of the fee simple of the land taken; and a further sum of £4000 for all damage sustained or to be sustained by reason of the injuriously affecting the other lands of the claimant by the exercise by the local board of their statutory powers, and judgment was given accordingly.

The local board paid the £8737, but contested the claim to the £4000, and in order to raise the point obtained a rule nisi for a certiorari to remove into the Queen's Bench Division the inquisition, verdict, and judgment upon the ground of excess of jurisdiction.

The Queen's Bench Division (Mathew and Day JJ.) discharged the rule (1). The Court of Appeal (Lord Esher M.R. and Lindley and Lopes L.JJ.) reversed that decision, and made an order that the writ of certiorari should issue, and that the inquisition, verdict and judgment as to the sum of £4000 should be quashed when returned (2). Against this order the claimant appealed.

Feb. 25, 26, 28. Sir *Horace Davey* Q.C. (*C. H. Anderson* Q.C. with him) for the appellant:—

Looking at the terms of the summing-up the jury must be taken to have found that the mere contiguity of the sewage works depreciated the value of the appellant's neighbouring land which was not taken, i.e. its value as building land when the brick earth should be worked out. No physical injury was suggested; the claimant's witnesses assumed that the best methods would be adopted, and that there would be no smell or nuisance but that people would anticipate that there would be a nuisance. If such damage be sentimental it is still real: people will not take houses near sewage works if they can get houses at a distance, or at least will not give so much for them. Such damage would not

(1) 14 Q. B. D. 753. (2) 17 Q. B. D. 447.

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be the subject of compensation if land of the claimant had not been taken, but as land has been taken there is an injurious affection within the Act. This is the result of the authorities. The appellant's contention is conveniently stated in the judgments of Mathew and Day JJ. (1). The decision in *In re Stockport, Timperley, and Altrincham Ry. Co.* (2) covers the present case, being a decision upon the very point. In *Duke of Buccleuch* v. *Metropolitan Board of Works* (3) the umpire gave compensation for damage similar to that now claimed, and properly read that case confirms the *Stockport Case* (2). The decision in *Caledonian Ry. Co.* v. *Ogilvy* (4) has been so much commented on and differed from that it cannot be regarded as an authority in any case except one in which the claimant's name is Ogilvy and the undertakers are the Caledonian Railway Company: see *Caledonian Ry. Co.* v. *Walker's Trustees* (5). The damage must be caused by the construction of the works and not by the user, in cases where no land is taken or where the damage is not done upon the land taken; *City of Glasgow Union Ry. Co.* v. *Hunter* (6), and other cases. But the distinction between cases where land of the claimant is taken and where no land is taken is well established: *Reg.* v. *Sheward* (7), where Bramwell L.J. repeated his disapproval of *Rex* v. *Pease* (8), and *Vaughan* v. *Taff Vale Ry. Co.* (9) as decided in the Exchequer Chamber.

There remains the question whether the Court of Appeal was right in holding that because the land affected did not adjoin the land taken the claim must fail (10). This proceeds upon a misunderstanding of the words "held therewith" in sect. 49 of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) (11).

(1) 14 Q. B. D. 753.
(2) 33 L. J. (Q.B.) 251.
(3) Law Rep. 3 Ex. 306, 329; Ibid. 5 Ex. 221; Ibid. 5 H. L. 418.
(4) 2 Macq. 229.
(5) 7 App. Cas. 259.
(6) Law Rep. 2 H. L., Sc., 78.
(7) 9 Q. B. D. 741.
(8) 4 B. & Ad. 30.
(9) 5 H. & N. 679.
(10) 17 Q. B. D. 447.
(11) Sect. 49 of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) is as follows:—"Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein belonging to the party with whom the question of dis-

Those words mean that the lands must be held by the same owner under the same title, all forming part of one estate. The fact of a division by road or river is immaterial; see per Cockburn C.J. in *Holt* v. *Gas Light and Coke Co.* (1).

Sir *R. E. Webster* A.-G. and *E. H. Pollard* for the respondents:—

First, the damage claimed is not a subject of compensation where part of the claimant's land is not taken. The only subject of compensation is damage caused by the construction or execution of the works and not that caused by user: *In re Penny* (2); *Hammersmith and City Ry. Co.* v. *Brand* (3); and other cases. The future use or abuse of the works is not a matter for consideration. Apart from the Lands Clauses Act if a nuisance arises from negligence in the user there is a right of action. If a nuisance happens without negligence and in spite of all reasonable means to prevent it there might still be a right of action on the principle of *Rylands* v. *Fletcher* (4), that one who stores or collects on his own land something which may injure his neighbour is bound at his peril to keep it so that no injury does happen. Here the damage if any would arise not by the construction of the works but by the user. If the land had been acquired without statutory powers no action would have lain for

puted compensation shall have arisen, or which under the provisions herein contained he is enabled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act or any Act incorporated therewith."

Sect. 63: "In estimating the purchase money or compensation to be paid by the promoters of the undertaking, in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act or any Act incorporated therewith."

(1) Law Rep. 7 Q. B. 728, 735.
(2) 7 E. & B. 660, 671, 672.
(3) Law Rep. 4 H. L. 171.
(4) Law Rep. 3 H. L. 330.

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the construction of the works: consequently upon the authorities there is no claim for compensation: *Caledonian Ry. Co.* v. *Ogilvy* (1); and other cases.

Secondly, the taking of a portion of the claimant's land does not enlarge the right to compensation. The *Stockport Case* (2) is distinguishable from the present on the ground taken by the Court of Appeal, but it is also bad law and should be overruled, because it contradicts the well-established principle that damage from user is not the subject of compensation. *Rex* v. *Pease* (3), and *Vaughan* v. *Taff Vale Ry. Co.* (4) are too well settled to be now overruled. That the mere taking of a portion of the land does not enlarge the claim was the opinion of Lord Bramwell as expressed in the Court of Exchequer, and of Lord Blackburn in the Exchequer Chamber, in the *Duke of Buccleuch's Case* (5). Doubt was there thrown upon the *Stockport Case* (2) by those learned judges, and also by this House in *Hunter's Case* (6). Further, the damage claimed for existed only in the imagination: it was sentimental, not substantial, and was therefore too remote. An actionable nuisance could be restrained by injunction: the dread that an injunction may have to be applied for is not the subject of compensation.

Thirdly, the lands in respect of which the claim is made were not "held with" the land taken within the meaning of the Lands Clauses Act, s. 49. Part of it is separated from the land taken by other land, and of the rest the whole is separated by a railway line and a portion by a road. If the appellant's contention were sound lands in a different parish or county would be "held therewith." It is admitted in the appellant's argument that none of the lessees of this land can claim for injurious affection. How then can the reversioner? To bring the case within the Act there must be an identity of holding for all purposes affecting the value of the land; such a state of things that there can be no interference by any one else: at the time of the service of notice to treat the lands must be capable of being

(1) 2 Macq. 229, 235, 246.
(2) 33 L. J. (Q.B.) 251.
(3) 4 B. & Ad. 30.
(4) 5 H. & N. 679.
(5) Law Rep. 3 Ex., at p. 328; Ibid. 5 Ex., at p. 244.
(6) Law Rep. 2 H. L., Sc. 78.

used by the owner as a whole for one purpose. Here the lands were not used for the same purpose, the land taken being part of a building estate, the other lands being let on brickmaking leases. Unity of title is not enough; "Held therewith" means connected therewith, not only owned but possessed, held or enjoyed for the same purpose as to user, or at all events connected with the other lands for the owner's purposes, e.g. for a rifle range, as in *Holt* v. *Gas Light and Coke Co.* (1). The question is one of law: but if it be one of fact, there is no evidence that the lands were "held therewith." The circumstances as to severance and contiguity are quite different from those in the *Stockport Case* (2), and that case is no authority upon this point.

Sir *Horace Davey* Q.C. in reply:—

As to the third point, unity of title if not conclusive enters into the consideration. The mere fact that part of the lands are let for a long term at a ground rent and part for a shorter term at a higher rent cannot prevent the case from coming within the words "held therewith." The question is one of fact, and this answers the objection as to lands in different counties.

As to the main question, *City of Glasgow Union Ry. Co.* v. *Hunter* (3) is distinguishable from and does not affect the *Stockport Case* (4) because in the former the acts complained of as an injurious affection were not done on the land taken; in the latter they were.

The House took time for consideration.

April 8. LORD HALSBURY L.C.:—

My Lords, for some time I was doubtful whether the question mainly argued in this case properly arose, since the direction of the under-sheriff, if I were to suppose it had been acted upon by the jury, would have raised another and, to my mind, more serious question than that upon which the respondents in this appeal insist.

I should hesitate very much to affirm the proposition that a

(1) Law Rep. 7 Q. B. 728.
(2) 33 L. J. (Q.B.) 251.
(3) Law Rep 2 H. L., Sc. 78.
(4) 33 L. J. (Q.B.) 251.

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belief in imaginary injury, though in fact an existing belief, and in fact affecting the marketable value of property, furnished any ground either for damages in an action or for compensation under the Lands Clauses Act.

The under-sheriff appears to have assumed that no possible injury, in the true sense of that word, could arise from the establishment of these sewage works, but that a compensation jury might award a sum of money if they came to the conclusion that a belief, however unfounded, that the sewage works would inflict injury upon the neighbourhood were established to have affected the marketable value of the land in the immediate vicinity of such sewage works. My Lords, I should hesitate very much to acquiesce in such a view. But we are here discussing a question raised by the issue of a writ of certiorari, which writ, as it is expressly taken away by statute (1), can only issue where the jurisdiction has been exceeded, and if the jury had before it materials upon which it was entitled to award anything in respect of the injury actually likely to result from the establishment of the sewage works, then, as your Lordships have nothing to do with the amount, you cannot say that the jurisdiction was gone, because the jury may have awarded too much, or because the under-sheriff had over-stated or under-stated the result of the evidence given.

Now, upon full consideration, I think there was evidence justifying the jury in awarding something. The account of the proceedings before the under-sheriff, imperfect and fragmentary as it is, nevertheless discloses this: that part of the argument directed to shew that no injury would result rested upon the proposition that if the works were not carefully and properly conducted they could be restrained by injunction as often as any annoyance arose to the neighbourhood from the improper mode of conducting them.

Now I think that the liability of a neighbourhood to such, even occasional and exceptional, annoyances is a real injury to property, and not fanciful or imaginary.

It is doubtless attributed to Lord Hardwicke that he once said "the fears of mankind, though they may be reasonable ones, will

(1) The Lands Clauses Act 1845 (8 & 9 Vict.) s. 145.

not create a nuisance (1)." But if Lord Hardwicke ever really did say so it is quite clear that that is not now the law, if the fears are assumed to be reasonable. The existence of a large collection of explosive matter in the vicinity of a town has been held to be a nuisance (see *Reg.* v. *Lister*. (2))

The good sense of mankind recognises the fact that occasional negligence is one of the ordinary incidents of human life, and the common law, which embodies the common sense of the nation, proceeds upon common-sense assumptions. I do not think it is any answer to tell people who complain of the establishment of sewage works in their neighbourhood that if and when the sewage works become a nuisance, in the real and proper sense of that word, such works can be restrained by injunction. Land is certainly more marketable when it is free from works of that character than when such works are established, although the neighbours may have the ordinary right of citizens to engage in litigation against such works when they become a nuisance.

I have, therefore, come to the conclusion that it was open to the jury to find that the appellant's land not taken by the local board would be injuriously affected by the construction and *use* of the sewage works.

My Lords, with reference to the main question I have had less difficulty, since I take it that two propositions have now been conclusively established. One is, that land taken under the powers of the Lands Clauses Act, and applied to any use authorized by the statute, cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation. But a second proposition is, it appears to me, not less conclusively established, and that is, that where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works.

(1) *Anon.* 3 Atk. 751; S. C. *Baines* v. *Baker*, Amb. 158, where those words are not reported.

(2) Dears & B. C. C. 209; 26 L. J. (M.C.) 196.

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It may seem at first sight a little strange that what is injurious affecting in one case should not be in the other. But it is possible to explain that apparent contradiction by the consideration that the injurious affecting by the use, as distinguished from the construction, is a particular injury suffered by the proprietor from whom some portion of his land is taken different in kind from that which is suffered by the rest of Her Majesty's subjects.

It is, however, unnecessary to consider the question as if it were res integra, since I think that *Buccleuch* v. *Metropolitan Board of Works* (1) has established the proposition in such a way as to be binding upon your Lordships. I think it is impossible to explain away that case when the question expressly raised was whether the umpire had awarded damages in respect of the future use of the embankment as distinguished from its construction, and when it was admitted that he had awarded damages in respect of the use of the intended road, and your Lordships affirmed the right to make such an award.

My Lords, as I understand the judgment of the Court of Appeal, it proceeds upon the ground that, assuming injury in fact by the use of the sewage works and acquiescing in the decision in the *Stockport Case* (2), it nevertheless comes to the conclusion that the lands injuriously affected were not "other" lands of the proprietor within the meaning of the statute, because in the view their Lordships entertained some portion at all events of the land injuriously affected had been already severed by a railway.

My Lords, I am unable to concur in the construction of the statute which that argument assumes. A person lays out a building estate in which unity of design, correspondence of the lines of building, adaptation of roads, open spaces, and the like, all have or may have relation to each other. Take the most familiar example. Suppose in the proprietor's building plan the roads were intended to take a particular direction, and by the withdrawal of one piece of land the whole arrangements of the intended building scheme should be dislocated; would it in reason and common sense be any answer to a claim for compensation to say the piece of land taken is at a distance from and even severed by some other construction from the place where

(1) Law Rep. 5 H. L. 418. (2) 33 L. J. (Q.B.) 251.

you are going to conduct your roads? Many other examples might be given: arrangements for sewers, gas, water, and the like, relate to the unity of the estate, as one thing, the usefulness and market value of which might be interfered with by the withdrawal of part; and it is in each case a question of fact dependent upon its own circumstances whether what I have called the unity of the estate is interfered with. In this case I think it was properly for the jury, and has been lawfully adjudicated upon by them.

For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed and the judgment of the Divisional Court restored; that the respondents should pay to the appellant the costs of this appeal and in the Court below, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, the appellant is owner of certain lands at Acton, two parcels of which have been let on long building leases containing usual covenants prohibiting the erection or alteration of buildings without his consent. In 1883 the respondents, under a provisional order which incorporated the powers of the Lands Clauses Acts, gave notice to take about five acres of the lands so demised, for the purpose of constructing thereon works for the collection and deodorisation of sewage. Compensation was assessed by a jury, who allowed the appellant £8737 for the purchase of his interest in the land taken, and also £4000 for all damage sustained or to be sustained by reason of the injuriously affecting his other lands by the exercise of the respondents' statutory powers.

It was admitted on both sides of the bar that the sum of £4000 was awarded in respect of damage to the appellant's remaining lands, other than those let on building leases. The prospective damage, which the jury took into account in fixing that sum, can only be ascertained from the evidence submitted to them, and the directions given them by the under-sheriff in his charge The inference which I derive from these sources is, that the jury, in estimating compensation for injuriously affecting, were mainly influenced by the consideration that sewage works of the character contemplated by the respondents, though capable of being con-

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ducted, and usually conducted, so as not to create any actionable nuisance, are nevertheless, even when so conducted, distasteful to householders, and tend to depreciate the market value of building land in their vicinity, and also that negligence in the conduct of the works may occasionally give rise to actionable nuisance. It therefore appears that a considerable part of the compensation awarded, in one lump sum, by the second finding of the jury, covers damage to arise from the future use of the works for statutory purposes.

The respondents are seeking, in this suit, to quash the verdict, in so far as relates to the second finding; and in the argument addressed to your Lordships they maintained that the jury exceeded their statutory jurisdiction, inasmuch as (1) they took into account damage to arise, not only from the construction of the sewage works, but from their authorized use after completion; (2) the prospective damage, for which they made an allowance, was too sentimental and remote to form the subject of statutory compensation; and (3) the lands in respect of which they gave compensation were not "other lands," or lands held "with" those taken, in the sense of the Lands Clauses Act 1845.

In the case of a proprietor from whom nothing has been taken by the promoters, it has been settled by a series of decisions in this House, that, although his land in the vicinity will necessarily be injured by the use of their works, yet it is not thereby "injuriously affected" within the meaning of the Act of 1845; and that he is not entitled to statutory compensation for injury so occasioned. The respondents argued that, upon a sound construction of the Act, the same rule ought to apply in cases where the promoters have acquired part of the claimant's lands for the purposes of their undertaking. I should have regarded the question thus raised as one of great nicety and difficulty, if I had not been of opinion that it has been already determined in *Buccleuch* v. *Metropolitan Board of Works* (1). The arbiter in that case allowed a large sum by way of compensation for depreciation in the value of the claimant's mansion which he expected to result from the use for traffic, with its attendant dust and noise, of an embankment and roadway formed upon land taken

(1) Law Rep. 5 H. L. 418.

from the claimant; and his award was sustained by Lords Chelmsford, Colonsay, Westbury, and Cairns. Although the noble and learned Lords agreed in result, they did not arrive at that result upon the same general construction of the provisions of the Act with respect to compensation. Lords Chelmsford and Colonsay constituted the majority in *Hammersmith and City Ry. Co.* v. *Brand* (1); but Lord Cairns, who constituted the minority, following the opinion which had been expressed by Lord Westbury in previous cases, disapproved of the limited meaning which the House, in that case, attached to the words "injuriously affected by the execution of the works."

In *Buccleuch* v. *Metropolitan Board of Works* (2), Lord Chelmsford, in whose judgment Lord Colonsay concurred, said (3), with reference to *Brand's Case* (1), and the subsequent case of *City of Glasgow Union Ry. Co.* v. *Hunter* (4): "In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use and not by the construction of the railway. But if, in each of the cases, lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise, occasioned by passing trains." I do not think that either Lord Westbury or Lord Cairns appreciated the distinction thus taken. These learned Lords were prepared to hold that injury arising from the "execution of the works" included in all cases, not only injury occasioned by their structural form, but injury to arise from their subsequent use. That difference of opinion is for the purposes of the present case immaterial; the fact remains, that noble and learned Lords, entertaining different views with respect to the construction of the statute, concurred in upholding the landowner's right to compensation, not merely in respect of the construction of works upon land taken from him but of the subsequent use of these works authorized by statute.

(1) Law Rep. 4 H. L. 171.
(2) Law Rep. 5 H L. 418.
(3) Law Rep. 5 H. L. 458.
(4) Law Rep. 2 H. L., Sc. 78.

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In *Caledonian Ry. Co.* v. *Ogilvy* (1), and also in *City of Glasgow Union Ry. Co.* v. *Hunter* (2), land had been taken from the claimants for railway purposes; but the use complained of as injurious was not of that part of the railway constructed on the land so taken, and was held in both cases to afford no ground for statutory compensation. It appears to me to be the result of these authorities, which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers. The construction of the Act which has been thus adopted by the House had previously been enforced by Mr. Justice Crompton in the *Stockport Case* (3).

I can discover no substantial distinction between the circumstances of this case, and the facts which were before the House in *Buccleuch* v. *Metropolitan Board of Works* (4). The prospective use, in respect of which compensation has been given, is confined to that portion of the appellant's land which the respondents have acquired from him for statutory purposes; and the kind of depreciation which the jury had in view appears to me to be ejusdem generis with that arising from traffic upon a public thoroughfare. Neither the use of sewage works, nor such traffic, amounts in itself to a legal nuisance; but the existence of either may alter the character of land in the neighbourhood, and diminish its value in the market. When the erection of sewage works at once diminishes the value of the claimant's other lands to the extent of several thousand pounds sterling, I think he suffers substantial and not imaginary injury, although the depreciation may be due, in a great measure, to an unreasonable antipathy to such works on the part of the purchasing or leasing public. These considerations appear to me to dispose of the arguments of the respondents, with the exception of that which relates to the position of the lands for which compensation has been awarded.

The "other lands" in respect of which an owner, who is selling

(1) 2 Macq. 229.
(2) Law Rep. 2 H. L., Sc. 78.
(3) 33 L. J. (N.S.) (Q.B) 251.
(4) Law Rep. 5 H. L. 418.

to promoters, can claim compensation if they are injuriously affected, are indifferently described in the Act of 1845 as "severed" from the land which is the subject of sale, or as "held therewith." I cannot assent to the argument that there can be no severance within the meaning of the Act unless the part taken and the parts left were in actual contiguity. I think the expression "the severing" as it occurs in sects. 49 and 63, read in the light of the context, merely signifies that what the promoters have acquired is separated from, in the sense that it can no longer be treated by the landowner as part of, the subjects which, until its purchase, he held along with it. What lands are to be regarded as "severed" from those taken, is, in my opinion, a question which must depend upon the circumstances of each case. The fact that lands are held under the same title is not enough to establish that they are held "with" each other, in the sense of the Act; and the fact that a line of railway runs through them is, in my opinion, as little conclusive that they are not. I shall not attempt to lay down any general rule upon this matter. But I am prepared to hold that, where several pieces of land, owned by the same person, are so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act; so that if one piece is compulsorily taken, and converted to uses which depreciate the value of the rest, the owner has a right to compensation.

Applying these principles to the facts of the present case, I see no reason to doubt that the lands in respect of which compensation has been awarded by the second finding of the jury were "held with" the five acres taken by the respondents. Their purchase has deprived the appellant of his power to regulate the class of buildings to be erected on these five acres, and has enabled the respondents to construct works, the use of which, the jury have found, will sensibly diminish the value of his lands on the other side of the Hammersmith Branch Railway. It is quite conceivable that railway works may be of such a character that the value of land on one side of them will cease to have any dependence upon the use made of land on the other side. But that is not the case here.

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For these reasons, I concur in the judgment which has been moved by the Lord Chancellor.

LORD BRAMWELL :—

My Lords, I think it convenient to consider first whether the land injuriously affected or which will be injuriously affected by the works of the respondents on the lands taken, is land held with the land taken within the meaning of 8 & 9 Vict. c. 18 s. 49. I think it is. I shall not attempt an exhaustive definition of those words; I should probably fail: I should leave out something that ought to be included, and include something that ought to be left out, and so give rise to future controversies. The words are not words of art. They are ordinary language, and must be understood with reference to their object. I think the present case is within them The lands have one owner. I cannot think it matters that they are separated by a railway; I suppose it would hardly be said that one part of a park separated from another part by a railway was not land held with that other part. Here the lands are close; what is done on one part must or might affect what would be done on the other. For example, what I mean is this: Houses of a particular class or character built on one part would influence the class or character of what would or might be built on the other. The class of occupants of one part would in like way influence the character of that on the other. On these considerations I am of opinion that the land in respect of which the claim is made here was land held with the piece taken.

Then as to the next question. We cannot go into the question of quantum. If there was any damage which the jury could give, their verdict must stand. Now it is proved, admitted, and is common knowledge that the sewage works on the land taken will be a nuisance to the lands left; not a sentimental nuisance, but a substantial diminution of the comfort and danger to the health of persons dwelling in houses on the land not taken. Whether if it was of a sentimental character only, as for example, if the land was taken for a cemetery or a prison, and it was proved that the value of the other land was thereby diminished, the amount of the diminished value could be recovered, I do not

say, either one way or the other. But in this case there is a substantial damage, a lessening of the health and comfort, or will be, to the land left by the taking of the pink piece, and the exercise of the powers of the Act; and it is admitted that the law is that no action would lie to recover any such damage. Then the case seems within the very words of sect. 49, and why is it not?

The argument of the Attorney-General, as I understand it, is this: But for the ownership of the pink piece, the appellant could not by action or otherwise recover compensation for damage to this land; if so, there is no reason why he should because he is owner of the pink piece. Nay, the legislature has designedly left persons without compensation by action or otherwise who are damaged, but none of whose land is taken, therefore it must be assumed that it meant to leave such cases as the appellant's without compensation, and that the injurious affecting in sect. 49 means an injurious affecting for which an action would lie if the nuisance was not caused in the exercise of statutory powers, in substitution for which action compensation is given. He would read therefore into sect. 49 these words "and for which but for these powers hereby given an action would lie." I see no reason for this; I think that the words of a statute never should in interpretation be added to or subtracted from without almost a necessity. The legislature could have added these words if it had thought fit. But further, it seems to me most reasonable that the owner of property should not be made to sell for its mere value a piece of his land, the possession of which and the use to be made of it will do to the rest of his land damage to ten times the value of that taken. It seems to me that, according to the reasoning of Sir James Hannen (1), a man ought to be paid a sum which he may reasonably ask, and that a man may reasonably ask the value of what is taken and a compensation for the damage that will be done on it to what is left. Take the case I put of two houses, each worth £50 a year, but the land on which they stand could be made worth £200 a year by their being pulled down and one house built on their sites. Would it not be contrary to all fairness and justice, would it not be robbery and plunder, if one house was taken, rendering improvement of the

(1) Law Rep. 5 H. L. at p. 445.

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other impossible, to make the owner take compensation for the loss of £50 a year only? I am unable to agree that the legislature meant that persons injured where lands were not taken should have no compensation. It has been so held I know, and by this House, and that decision is binding when the case arises, but for my own part I cannot construe the statute by the help of what I must think a wrong decision.

Now I do not wish it to be supposed that I have a sort of spite against *Rex* v. *Pease* (1), and that it is a pet point of mine that it was wrong, but, in support of my present opinion and with reference to the argument of the Attorney-General I must make a few remarks upon it. It is very clear how the provisions in the local Act which the Court had to consider in *Rex* v. *Pease* (1) came there. By the original Act, 1 & 2 Geo. 4, c. xliv., local and personal, "for making and maintaining a railway or tramroad," &c., the company constituted had by sect. 1 power "to make, complete, and maintain a railway." They had no power to act as carriers thereon. Their so doing would have been ultra vires. By sect. 81 "all persons shall have free liberty to use the railway with horses, cattle and carriages, for the purpose of conveying goods, &c., and to pass with carts, wagons, or other carriages properly constructed." By the subsequent Act, which was before the Court in *Rex* v. *Pease* (1), it was enacted that "it shall be lawful for the company or any person authorized or permitted by them to make and erect such and so many locomotive or moveable engines, and use and employ the same for the purpose of facilitating the transport of goods," &c. This provision was necessary to enable the company to act as hauliers, and the provisions as to other persons were necessary to give them powers and rights as against the company.

If these provisions gave a right to commit a public nuisance or private injury, I feel sure they were not intended to do so. But any how this reasoning, even if it justifies a public mischief for the public good, does not justify a private loss and damage. But of course the statute on which the cases of *Vaughan* v. *Taff Vale Ry. Co.* (2) and *Hammersmith Ry. Co.* v. *Brand* (3) depended

(1) 4 B. & Ad. 30. (2) 5 H. & N. 679.
(3) Law Rep. 4 H. L. 171, 189.

is 8 & 9 Vict. c. 20. Did that authorize the commission of a nuisance public or private? I will not repeat the arguments I have already used in *Hammersmith Ry. Co.* v. *Brand* (1), by all of which I abide, but there are one or two additional remarks I wish to make. In sect. 86, which authorizes railway companies to act as carriers, the words are: "It shall be *lawful* for the company to use and employ locomotive engines or other moving power, and carriages and wagons to be drawn or propelled thereby, and to carry and convey all such passengers and goods, &c." By sect. 87, "It shall be *lawful* for the company to enter into any contract with any other company being owners, &c., of any other railway for the passage over the railway of any engines, coaches, wagons, or other carriages." But by sect. 92 it is "Upon payment of the tolls, &c., all companies and persons *shall be entitled* to use the railway with engines and carriages." Observe the difference. It is *lawful* for the railway company to use engines but other companies are *entitled*. The words as to the incorporated company are permissive and enabling, "it shall be lawful." As to other companies a right is given, "they are entitled." It is a noticeable thing that according to the construction put upon this Act, the Festiniog Railway Company would be liable for damage done on its own line by engines to neighbouring property (2), but directly it gets on a line to which the railway clauses apply, it would not be liable!

But supposing *Rex* v. *Pease* (3) and *Vaughan* v. *Taff Vale Ry. Co.* (4) to be rightly decided, I should draw, not the conclusion that the Attorney-General wishes us to draw, but this: that while the legislature thought that persons whose lands were injured by the operations on other lands of the same ownership which were taken should have compensation, that right should not be extended to other cases, as that would give opportunity for vague and unfounded claims.

Now a word as to the authorities. The *Stockport Case* (5) is, I think, in point. I hope and think I meant no more than I said about it, viz., that I should like to think the matter over before

(1) Law Rep. 4 H. L. 171, 189.
(2) *Jones* v. *Festiniog Ry. Co.*, Law Rep. 3 Q. B. 733.
(3) 4 B. & Ad. 30.
(4) 5 H. & N. 679.
(5) 33 L. J. (Q.B.) 251.

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I agreed to it. I have thought it over, over and over again, and do agree to it. I think also that the *Duke of Buccleuch's Case* (1) is in point. It is indeed strange that in the judgments in the House of Lords in that case no reference is made to the *Stockport Case* (2), but I think that the principle is the same. As to *Hammersmith Ry. Co.* v. *Brand* (3), I own I think it was rightly decided in this House. I said that I thought *Rex* v. *Pease* (4) and *Vaughan* v. *Taff Vale Ry. Co.* (5) wrong; that the right of action was not taken away, nor compensation given. I added that if the House agreed with those cases, I thought they should affirm the judgment on the footing that if no action lay, there must be a right to compensation, and that as the erection of the railway must be followed by its use, therefore the erection of the works injuriously affected the plaintiffs. The fallacy of the argument is in the last sentence. I am afraid I was influenced by the feeling of the gross injustice and hardship of the case. I think the judgment in this case should be reversed.

LORD FITZGERALD:—

My Lords, the decision of the Court of Appeal reversing the previous decision of the Divisional Court rested entirely on the ground that the lands alleged to be "injuriously affected" had been on some prior occasion severed from the lands taken by the local board by the construction of a railway, and could not therefore be deemed to be "lands held therewith" within the meaning of the 49th section of the Act or "other lands of such owner" within the 63rd section. That question has been satisfactorily disposed of in the several judgments which have been delivered, in which I concur and can add nothing with advantage. The decision of the Court of Appeal cannot therefore be sustained. But for the supposed distinction in fact between the present case and the *Stockport Case* (2) the decision of the Court of Appeal must have been in affirmance of the judgment of the Queen's Bench Division.

The notice to treat coming from the local board of Acton claimed to take the plot 5A. 1R. 35P. "for the purpose of provid-

(1) Law Rep. 5 H. L. 418.
(2) 33 L. J. (Q.B.) 251.
(3) Law Rep. 4 H. L. 171.
(4) 4 B. & Ad. 30.
(5) 5 H. & N. 679.

ing for the sewerage and the disposal and utilization of the sewage of the district of the local board and the necessary works connected therewith." There can be no doubt on the evidence that the immediate consequence was that the adjoining land of the appellant, which had been laid out for building purposes and was separated from the land taken by the local board only by the permanent way of the railway, became at once actually "injuriously affected." The injury was no sentimental grievance, but a solid depreciation in the letting value, taking effect not remotely, but immediately. Mr. Baker says: "The mere fact of sewage works coming on that land coloured pink (the land taken) will depreciate the land coloured green 25 per cent. I may say I have had experience which confirms that." There was abundance of other evidence to the same effect. I am not surprised at it. It would only be by a material reduction in letting value of the land that parties might be tempted to build dwelling-houses in the immediate vicinity of a farm for the reception, disposal and utilisation of sewage, with its real or supposed tendency to create and foster organisms injurious to human health and life.

There being no doubt that the appellant's building land was thus in fact injuriously affected, the question of law is whether the sheriff's tribunal had jurisdiction under the statute (sects. 49 and 63) to assess the compensation for the appellant in respect of his lands being thus injuriously affected.

It cannot be doubted that the *Stockport Case* (1) is in point on this question of jurisdiction. It was vigorously assailed in the Court of Appeal, and one of the Lords Justices suggested that the rule laid down in that case ought to be considered by the House of Lords with a view to its being probably overruled. My Lords, that case has been the subject of much adverse criticism, but it has not been overruled, and up to the present moment the rule laid down by it has regulated right and liability in similar cases. It is said to have been adopted in principle in the *Buccleuch Case* (2), and if that is so, your Lordships should follow the latter case. I confess that I have some difficulty in adopting that view of the *Buccleuch Case* (2) and prefer considering the *Stockport Case* (1) on its own legal merits.

(1) 33 L. J. (Q.B.) 251. (2) Law Rep. 5 H. L. 418.

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My Lords, I feel bound to say that had I been a colleague of Crompton J. at the time I should probably have come to the conclusion that his interpretation of the statute was correct and in accordance with its language; and now, looking back at that decision through the quarter of a century that has since elapsed and aided by the light of additional experience, I think that it was a sound decision and certainly not now to be disturbed.

The anomalies or inequalities that have been pointed out arise from the statute and not from the *Stockport Case* (1), which follows its very language.

My Lords, I concur in opinion that the decision of the Court of Appeal should be reversed, and that of the Divisional Court restored, with all the consequences.

LORD MACNAGHTEN:—

My Lords, for the purpose of providing for the disposal and utilization of the sewage of the district of Acton, and the necessary works connected therewith, the Acton Local Board was authorized to put in force the powers of the Lands Clauses Consolidation Act 1845 with respect to certain lands containing 5A. 1R. 35P., of which the appellant was owner within the meaning of the Act.

The appellant had other lands at Acton adjoining the lands required by the local board. His property there was at the time in course of development as a building estate. Part, including the lands required, was let on building leases for long terms of years; part was let for brickmaking purposes; part was in hand. The property was cut in two by a railway running through it. There was apparently a communication of some sort between the lands thus severed. But there is nothing to be found in the evidence on the appeal to explain the nature of the communication or the configuration of the land bordering on the railway.

A notice to treat, stating the purpose for which the lands were required, was served upon the appellant. No agreement was come to, and the question of disputed compensation was submitted to a jury.

The jury assessed the value of the lands taken at £8737. As to that part of their finding there is no dispute. But they also

(1) 33 L. J. (Q.B.) 251.

awarded £4000 by way of compensation for damage to the appellant's other lands by the exercise of the statutory powers which the local board was putting in force.

A portion of the land in respect of which compensation was awarded was situated on the same side of the railway as the lands taken, but separated from those lands by a piece of ground which was included in a building lease, and in respect of which no compensation was claimed. The rest of the land in respect of which compensation was awarded was on the other side of the railway; part was in hand, part was let for a short term of years.

The first objection to the verdict is that the lands in respect of which compensation was awarded were not lands that could be "injuriously affected" within the meaning of the Act, because they had been already severed from the lands required, and were not held therewith for one and the same purpose. It is difficult to see the force of this objection. Lands in respect of which a claim for compensation may arise are referred to in the Act, in contradistinction to the lands taken or purchased from the owner thereof, as lands "held therewith" or as "the other lands" of such owner. The Act says nothing about their being held along with the lands taken or purchased for one and the same purpose, nor does it require that they should be in contact with those lands. Apparently it is enough if both parcels of land are held by one and the same owner, and if the unity of ownership conduces to the advantage or protection of the property as one holding. That condition seems to be implied. Otherwise the owner could hardly sustain injury by reason of the execution of the works on the lands taken.

If this view be correct the severance created by the railway was not of itself a bar to the appellant's claim. It was a matter to be taken into consideration. But the effect of such a severance must depend upon the circumstances of the case, including in those circumstances the configuration of the ground, and the difficulty or facility of making communications across the railway. In an ordinary case severance by a railway is not a complete separation, dividing the property into two distinct and independent holdings. Railway companies are bound to make proper communications between intersected lands. And if the owners

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consider the accommodation works made by the railway company insufficient for the commodious use of their land, they may at any time make such further works for the purpose as they think necessary, subject, of course, to the conditions prescribed by the legislature (1).

The other objection is one of general importance. It was argued that the compensation awarded was given in respect of injury anticipated from the use of the works when executed, and not in respect of injury caused by the construction or execution of the works, and it was said that the jury were not at liberty to take into consideration the purpose or probable effect of the works which the local board was authorized to construct.

Speaking for myself, I am not altogether satisfied that the decision of this House in the *Duke of Buccleuch's Case* (2) can be treated as determining the question. Upon that point I am rather disposed to agree in the view expressed by Lord Blackburn in a subsequent case (3). But all the arguments on both sides were so thoroughly discussed in the *Duke of Buccleuch's Case* (2), in its different stages, that it would, I think, be idle for me to do more than state generally the conclusion at which I have arrived.

I think it is impossible to read the Lands Clauses Consolidation Act without seeing that it was the intention of the legislature that full compensation should be given in all cases where lands are taken under the powers of the Act for the purposes of a public undertaking. To give one instance of the extreme care shewn in providing compensation, I may remind your Lordships that if the lands required are subject to a mortgage for a fixed period, the mortgagee is entitled to the costs of re-investment in addition to the sum to be paid to him in respect of his mortgage; if the rate of interest secured by the mortgage be higher than can be reasonably expected on re-investment, he is also entitled to compensation for the loss to be sustained by him by reason of his mortgage-money being prematurely paid off. Suppose land let to a builder for the erection of first-class houses, and a mortgage by the lessee for a fixed period: and then suppose that part of the land is required for the purpose of some public undertaking,

(1) 8 & 9 Vict. c. 20, s. 71.
(2) Law Rep. 5 H. L. 418.
(3) *Caledonian Ry. Co.* v. *Walker*, 7 App. Cas. at p. 297.

likely to spoil the character of the neighbourhood, the mortgagee would be compensated to the utmost farthing, but if the respondents are right the lessee would be left without compensation. His scheme might be destroyed, his houses might be unsaleable, and he might be ruined, though the Act declares in so many words that he "shall be entitled to receive from the promoters of the undertaking compensation for the damage done to him in his tenancy by reason of the severance of the lands required from those not required, or otherwise by reason of the execution of the works" (1).

It may be said that an adjoining lessee or owner from whom no land is taken might suffer in the same way, and that he would be without redress. That is true. But I cannot see why a person whose case is within the spirit and within the very letter of the Act should be deprived of the full measure of compensation because his neighbour, who is not within the Act at all, is perhaps hardly dealt with.

Where land is required for public purposes, the injury, if any, to the owner's adjoining property depends mainly on the character of the undertaking. There are various purposes for which local boards may be authorized to take land. They may take land for pleasure grounds. They may take land for sewage purposes. But before putting in force any of the powers of the Lands Clauses Consolidation Act a local board is bound to publish the nature of the proposed undertaking, to define the lands required, and to collect, as far as possible, the views of all persons interested in those lands. Then comes a public inquiry, to be followed in due course by a provisional order, and an Act confirming it. These elaborate provisions, designed apparently for the protection of private as well as public interests, would be something of a mockery if a person from whom land is taken is to be told, when he asks for compensation, that at that stage of the proceedings it is all one whether his land be required for a public garden or for a sewage farm.

It was said that the objection to a sewage farm comes from an unfounded apprehension of possible mischief. Does that matter? Call it what you will: ignorance, or prejudice, or fancy; the loss to the owner who may want to sell is not the less real. In such

(1) Sect. 120.

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a case apprehension of mischief is damage of itself. And the depreciation in value must be the measure of compensation if the owner is to be compensated fairly.

The promoters of an undertaking can only take lands for the purpose authorized by their Act. When the lands are taken, the promoters can only use them for that purpose. It is the purpose of the undertaking, and that alone, which justifies its existence, and directs and controls the exercise of its powers. And yet it is said that on a question of disputed compensation the arbitrators or the jury, as the case may be, are to shut their eyes to the purpose of the undertaking, and to make believe that the intended works are some innocent and meaningless folly.

I do not think that there is anything in the Act which leads to a conclusion so absurd and so contrary to common sense. When lands are required for the purpose of a public undertaking, and the owner claims compensation for injury to other lands held therewith, I think the tribunal which assesses compensation is bound to take into consideration the purpose of the undertaking, the consequences likely to result from the execution of the works on the lands required, and any alteration in the character of the property which those works are calculated to bring about.

The *Stockport Case* (1) is precisely in point. It has been much criticised, but I think it has stood the test of criticism. In practice I believe it has always been followed; and I think it is perfectly right.

I am therefore of opinion that the judgment of the Divisional Court was right, and that the judgment of the Court of Appeal should be reversed.

Order appealed from reversed. Order of the Queen's Bench Division restored, with costs here and below; cause remitted to the Queen's Bench Division.

Lords' Journals 8th April 1889.

Solicitors for appellant: *Hedges & Brandreth.*
Solicitor for respondents: *Alexander Helmsley.*

(1) 33 L. J. (Q.B.) 251.

[HOUSE OF LORDS.]

JOHN MEMBERY (PAUPER) . . . . . APPELLANT;

AND

THE GREAT WESTERN RAILWAY COMPANY . . . . . RESPONDENTS.

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May 14.

Negligence—Contract by Servant with Master to do Dangerous Work on Defendant's Premises—Contractor—Breach of Duty—Maxim "Volenti non fit injuria."

A railway company agreed with a contractor that he should shunt their trucks upon their line and should supply horses and men for that purpose, the company to provide boys to assist in the shunting when they had boys, and when they had not the shunting to be done without boys. For several years the plaintiff as the servant of the contractor shunted trucks on the company's line, sometimes with and sometimes without boys. The operation of shunting is dangerous to any man performing it without assistance. The plaintiff on one occasion asked the company's foreman for a boy, but as the company could not provide one proceeded to shunt trucks alone and without any negligence on his part was injured by a truck running over him. In an action by him against the company:—

Held, that there was no evidence for the jury of any negligence or breach of duty on the part of the railway company towards the plaintiff, and that he had therefore no cause of action.

Held, also, by Lord Halsbury L.C. and Lord Bramwell:—That the plaintiff was also prevented from recovering because he had voluntarily done the work with full knowledge of the risk he ran.

By Lord Bramwell:—Where a man is not physically constrained, where he can at his eption do a thing or not, and he does it, the maxim Volenti non fit injuria applies.

APPEAL from a decision of the Court of Appeal.

In an action by the appellant against the respondents the material parts of the statement of claim were as follows:—

1. The plaintiff was in the employment of Mr. Younghusband, who had contracted with the defendants to supply men and horses for the shunting of trucks upon their line.

2. By the terms of the defendants' contract with Mr. Younghusband the defendants agreed to supply the services of a boy to unfasten the chain by which the horse drawing the truck was attached thereto, and the services of such boy were as the

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defendants well knew, or ought to have known, requisite for the safety of the plaintiff in the course of his said employment.

3. On the 26th of November 1884 the plaintiff was engaged in the course of his employment in shunting trucks.

4. The defendants wrongfully and negligently omitted to supply the services of the boy as aforesaid, and by reason of the said negligence the plaintiff in the course of his employment was knocked down by the horse and sustained such injuries as necessitated the amputation of his left foot, the same having been run over by the truck, whereby he suffered, &c.

The statement of defence denied seriatim all the allegations of the claim and alleged contributory negligence in the plaintiff, and alleged alternatively that the injuries were the result of inevitable accident.

At the trial before Manisty J. and a special jury in December 1887 the following evidence was given.

Several years ago Younghusband contracted with the defendants to shunt their trucks for them on their line near Paddington, Younghusband to find the men and horses, the defendants to supply boys to unhook the drawing chain from the truck. This arrangement went on till about 1877: when a new arrangement was made under which the company were to provide boys if they had them, if they had not the shunting was to be done without boys. After this change the plaintiff and other men employed by Younghusband to shunt trucks constantly complained to the company's servants of the want of boys. To a man shunting trucks without assistance there was danger, because he had to guide the horse and at the same time to unhook the chain from the truck while in motion. The plaintiff had been at this work for about sixteen years, and since 1877 had shunted trucks sometimes with and sometimes without boys. On the night in question he asked the defendants' foreman for a boy, and was answered, "When I have got one, you shall have one." Thereupon the plaintiff proceeded to his work alone. At the moment of unhooking a truck he called to the horse to come out of the track and unhooked the chain but was caught between the horse and truck, fell, and the truck ran over his foot.

The defendants' counsel called no witnesses and submitted that

there ought to be a nonsuit, but Manisty J. left to the jury the questions whether it was reasonably the duty of the defendants to supply a boy, whether they neglected that duty, whether that was the negligence which caused the accident, and whether the plaintiff contributed by his negligence to the accident. The jury found that there was negligence on the part of the defendants, that that negligence was the sole cause of the accident, and gave a verdict for the plaintiff for £50. Manisty J. gave judgment accordingly.

The defendants having moved to set aside the verdict and judgment and enter judgment for them on the ground that there was no evidence for the jury of any breach of duty or liability on the part of the defendants, or in the alternative for a new trial upon the ground of misdirection, the Divisional Court (Mathew and A. L. Smith JJ.) refused the application upon the ground that there was evidence of negligence on the defendants' part; that upon the authority of *Thomas* v. *Quartermaine* (1) and *Yarmouth* v. *France* (2) it was a question for the jury whether the plaintiff was volens within the meaning of the maxim Volenti non fit injuria, and that there was evidence in this case that the plaintiff did not act voluntarily.

On appeal the Court of Appeal (Lord Esher M.R. Lindley and Bowen L.JJ.) reversed that decision and made an order to set aside the verdict and judgment and enter judgment for the defendants on the ground that even if there were evidence of negligence on the part of the defendants the plaintiff had acted voluntarily and with full knowledge of the danger he ran, and that the two authorities above mentioned were not applicable.

Against this order the plaintiff appealed.

May 13, 14. *W. Lynden Bell* (*Waddy* Q.C. with him) for the appellant:—

It is admitted that there was no contract by the railway company that they should supply a boy: but it was their duty to do so. At their request the plaintiff was engaged to shunt their trucks on their premises: he could not provide a boy for himself; they knew or ought to have known that assistance was necessary

(1) 18 Q. B. D. 685. (2) 19 Q. B. D. 647.

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to make the employment safe, and that the want of assistance might cause danger to the plaintiff, yet they did not provide assistance. The plaintiff while performing his duty at their request was injured through the want of assistance. They invited him (or his master which is the same thing) to do the work without assistance. There lies the cause of action. A person who invites another to his premises is bound to use due precaution against injury: *Indermaur* v. *Dames* (1). The present case comes within the rule laid down by Brett M.R. in *Heaven* v. *Pender* (2). There is a moral and legal obligation not to expose another person to unnecessary risk, either by act or omission. The neglect to supply a boy was equivalent to negligence in supplying defective tackle. In *Woodley* v. *Metropolitan District Ry. Co.* (3) the plaintiff was defeated in the Court of Appeal upon the principle of Volenti non fit injuria, but even Cockburn C.J. who was against him thought that the railway company were guilty of negligence or breach of duty. That case will be relied on by the respondents, but the true meaning of the maxim Volenti non fit injuria is explained by Mellish L.J. (4). A man who unwillingly performs dangerous work because he would otherwise lose his employment is not volens. A man does not act voluntarily unless he acts free from legal or moral compulsion. If there be fear of pecuniary loss there is no necessary inference of voluntaryism. The question is one of fact for a jury. Here it was a case of "my poverty and not my will consents;" the plaintiff complained more than once of the want of boys. That the question is one of fact appears from *Thomas* v. *Quartermaine* (5), where Bowen L.J. insists that mere knowledge of the danger is not enough and points out that the maxim is not "Scienti non fit injuria," but "Volenti." *Yarmouth* v. *France* (6) is also a strong authority for the appellant on the point that it is not enough to shew that the plaintiff had full knowledge of the danger. Those were decisions under the Employers' Liability Act, but that does not affect their value or the general principle. There was therefore

(1) Law Rep. 1 C. P. 274; Ibid. 2 C. P. 311.
(2) 11 Q. B. D. 503, 509.
(3) 2 Ex. D. 384, 388.
(4) 2 Ex. D. 393.
(5) 18 Q. B. D. 685, 696.
(6) 19 Q. B. D. 647, 657, 659.

on both points a question for the jury: and if so the decision of the Court of Appeal must be reversed.

F. Lockwood Q.C. and *John Digby* for the respondents were not heard.

LORD HALSBURY L.C.:—

My Lords, in some respects this is certainly a very remarkable case, because the ground upon which the original verdict for the plaintiff was obtained has been abandoned by the learned counsel who has appeared in support of the judgment of the learned judge and the verdict of the jury.

Manisty J., upon the facts with which we are now familiar, appears first to have rested the liability of the company on the ground of a duty cast upon them by a contract with their contractor. He says in terms (to which I called the attention of the learned counsel) that it was a term of the contract that the company should find a boy, and he proceeds upon that assumption to rest the whole liability of the company upon their neglect in that respect in not fulfilling the obligation of the contract; and that undoubtedly is consistent with the statement of claim which the plaintiff brought and upon which the case was decided. We have now in the very learned and able argument of Mr. Bell an admission that that fact, cardinal to the case, as it was conducted at the trial before the jury, is to be abandoned, and that there is no evidence to justify that allegation. We are therefore remitted to what is practically an application by the learned counsel who appears in support of the verdict that upon another ground and upon a different cause of action this case should be submitted to another jury in order to see whether they can found a verdict upon such cause of action, on which the plaintiff can retain what he claims against the defendants.

Now, my Lords, it appears to me that the original ground of the action having been abandoned and the verdict of the jury upon that theory being perfectly immaterial to the facts which are now put in proof under your Lordships' review, it would be almost enough for the purpose of disposing of this case to say that the whole ground of action as insisted upon at the trial has

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absolutely failed, and that it is perfectly impossible to maintain the right either to have a new trial or to have the verdict entered for the plaintiff. But I am unwilling to treat the case upon that ground, because it appears to me that upon much broader grounds it is impossible to maintain the right of the plaintiff in this case: and in truth one is embarrassed by the abundance of materials for shewing that he has no case. The commencement of one's embarrassment in that respect is to ascertain in what way the obligation of the company is supposed to arise—what is the duty cast upon the railway company which the railway company have neglected.

The learned counsel has quoted a variety of cases establishing a proposition which I think at this time of day nobody will dispute, namely, that apart from a contract, apart from contractual relations either with the plaintiff himself or with the plaintiff's employer, where any person is brought upon premises belonging to the individual charged with negligence there is a duty to inform the person who is brought upon the premises of anything in the nature of a trap from which he may suffer injury. I am not aware that any case has ever been heard of in which such an obligation as is now insisted upon has been maintained. In the case of *Woodley* v. *Metropolitan District Ry. Co.* (1) where Mellish L.J. pointed out the circumstances under which in his view the defendants were liable, the defendants themselves did the negligent act which occasioned the injury; the defendants themselves ran the train at its ordinary speed, without notice, without giving warning to the man who was working in their tunnel or the opportunity of getting out of the way. Whether or not it would have been found one way or the other that the man himself was so careless as to disentitle him from recovering, the fact remains that they did the act which caused the injury—they ran him down with their train which was going at an undue speed at the particular point by which they were passing when they knew that a person was there who might be injured. What analogy has that case to the case now before your Lordships? It is almost reducing the thing to an absurdity by the mere statement of the proposition. Not only does the man voluntarily do the thing,

(1) 2 Ex. D. 384.

but the phrase "contributory negligence" is a very inadequate statement of the facts. The thing done is done by himself, he does not contribute to it but he does it; he puts the thing in motion; he sets the horse going—it is his act which leads to the injury; and, forsooth, it is said that because he is not a volunteer, for reasons which I will discuss in a moment, his act does not debar him from the right to recover. But it is obvious that all that Mr. Bell has assumed in the course of his argument, each of the facts upon which he relies, is the subject-matter of controversy. He says that the man was compelled to do the act, and that that compulsion was forced upon him by the situation in which he found himself, namely that he was under the apprehension that he would otherwise lose his employment. Now there is a fallacy lurking in each of the premises used. He was not engaged to do the work by the only persons responsible, namely, the railway company. The railway company had made a contract with their contractor, which for seven years had been pursued in exactly the same fashion, that is to say, that when they could find a boy they would, and when they could not the shunting would go on without him. That was the only mandate which the plaintiff received directly from his employer. What evidence is there that he was compelled to do this by fear of losing his employment? It is obvious that there is no such evidence, and the learned counsel was compelled to have recourse to that one phrase "we had to do it." "We had to do it" is ambiguous, because it may mean "we had to do it under the contract; we had to do it without any boy when no boy was to be had." That is as true an exposition of that phrase as the one upon which Mr. Bell insists.

The matter comes therefore to this, that the liability which is sought to be cast upon the company is that they have contracted with a man to shunt their trucks, that he has employed in his turn a servant of his to shunt the trucks, and that because it is said that it cannot be done without other assistance the railway company, forsooth, are under some particular contract to supply that which is necessary to be supplied in order that the thing may be done safely. My Lords, it seems to me to reduce the whole question to something too ludicrous to give verbal expression to. There is an absence altogether of any obligation upon

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the bare statement of it. The man obviously encountered a known risk which he had encountered for a period of seven years, and therefore he is not entitled to recover, upon the ground that he was voluntarily incurring the risk—he knew that the risk existed; and further, he was himself doing the very thing which caused danger and ultimately injury to himself.

Upon each of these grounds it appears to me that the plaintiff's claim against the company in this respect fails; and they exist here to a degree which I confess leads me somewhat to lament that an action in which there is absolutely no case has gone from a Court of Assize to a Divisional Court, and then to the Court of Appeal, and finally comes up to this House under circumstances which I venture to say, if there had been a precise statement of the supposed cause of action and the evidence to be adduced in support of it, would have undoubtedly convinced anybody that the plaintiff had no right to recover. Under these circumstances, I move your Lordships that this appeal be dismissed and the judgment of the Court of Appeal affirmed.

LORD BRAMWELL:—

I also am of opinion that this judgment should be affirmed, on two grounds. First, the plaintiff has wholly failed to make out a case, to make out anything that called for an answer. He alleged in his statement of claim that the defendants undertook to find a boy to help in the work the plaintiff had to do; without which help the work was dangerous, as the defendants knew. He failed to prove such undertaking. It was manifest, and ultimately admitted, that whatever the defendants may have undertaken at one time, at the time of the accident there was no such undertaking. The plaintiff was therefore driven to contend, and did contend, that where a workman is engaged by an employer to do work, which the employer has contracted with a third person to do on the premises of that third person, and the work is dangerous without help, it is the duty of the third person to furnish such help. And though he has not only not contracted to find it but refused on other occasions to do so. For this there is absolutely no pretence. I need scarcely add no authority was cited in support of it. Unfortunately the jury

were asked whether the defendants were negligent, and of course returned the charitable verdict that they willed that the defendants should pay the plaintiff £50. There really was no question of negligence. What the defendants did or omitted to do was wilful. This is not a question of words. If the right words had been used, it would have been seen that there was no question for the jury as to the defendants' conduct, but a question for the judge, a question whether they had failed in any duty they were under. In like way they were asked if the plaintiff was negligent. Nobody pretended that he was. His doing of the work was wilful. He was not negligent in the doing of it. Whether his wilfully doing it was an answer if a case had otherwise been made out was a question for the judge, one which I now proceed to consider.

I am of opinion that it was. Of course it is in a sense not necessary that I should express an opinion on this, as the ground I have first mentioned in my opinion disposes of the case. But if instead of mentioning that ground first, I had mentioned the one I am now dealing with, it would, on the same reasoning, be unnecessary to mention that. What I am saying is not obiter, not a needless expression of opinion on a matter not relevant to the decision. There are two answers to the plaintiff, and I decide against him on both; on one as much as on the other. Volenti non fit injuria, and the plaintiff was volens. I hold that where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim applies. What is volens? willing; and a man is willing when he wills to do a thing and does it. No doubt a man, popularly speaking, is said to do a thing unwillingly, with no good will, but if he does it, no matter what his dislike is, he prefers doing it to leaving it alone. He wills to do it. He does not will not to do it. I suppose nolens is the opposite of volens, its negative. There are two men, one refuses to do work, wills not to do it, and does not do it. The other grumbles, but wills to do it, and does it. Are both men nolentes, unwilling? Suppose an extra shilling induced the man who did the work. Is he nolens, or has the shilling made him volens? There seems to be a strange notion, either that a man who does a thing and grumbles is

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nolens, is unwilling, has not the will to do it, or that there is something intermediate between nolens and volens, something like a man being without a will, and yet who wills. If the shilling made him volens, why does not the desire to continue employed do so? If he would have a right to refuse the work and his discharge would be wrongful, with a remedy to him, why does not his preference of certain to an uncertain law not make him volens as much as any other motive? There have been an infinity of profoundly learned and useless discussions as to freedom of the will; but this notion is new.

This is an important question. Is the maxim to be got rid of? Are we to say Volenti fit injuria provided he grumbles, as Mr. Bell contended? To do so would be most unjust and unreasonable. The master says here is the work, do it or let it alone. If you do it, I pay you; if not, I do not. If he has engaged him, he says, I discharge you if you do not do it; I think I am right; if wrong, I am liable to an action. The master says this, the servant does the work and earns his wages, and is paid, but is hurt. On what principle of reason or justice should the master be liable to him in respect of that hurt? On this ground, also, I am of opinion the judgment should be affirmed. I may observe that the Court of Appeal thought that neither of the cases where this novel notion was entertained bore on the present.

LORD FITZGERALD:—

My Lords, I also am of opinion that the judgment of the Court of Appeal ought to be affirmed and this appeal dismissed: and I rest my decision upon one, as it appears to me, solid ground, without entering into some of the questions which have been discussed in the course of the argument. I think that, having regard to the statement of claim in the case which was before the learned judge who presided at the trial, it was his duty at the close of the plaintiff's case to have yielded to the requisition of the defendants' counsel and to have directed either a nonsuit upon the case then made or a verdict and judgment for the defendants.

Now Mr. Bell has shewn upon this occasion not alone ability but imperturbability and also flexibility; but it exceeded his art

to alter the plaint which is before us into any form which would give a substantial cause of action without abandoning the whole case both made upon the present statement of claim and also made at the trial, and upon which the jury decided, and upon which the learned judge gave his judgment in favour of the plaintiff. That is a thing not to be allowed, because although I would be far from tying any suitor down to mere technicalities, he ought to succeed, if he succeeds at all, upon the case, in substance, which he has raised Now I turn to the statement of claim and it consists really of two allegations, both of which in the amendment proposed will have to be abandoned; that is, first that there was a contract between this company and the present Mr. Younghusband, Mr. Younghusband junior, that the company in consideration of his performing this duty of shunting would provide him on all occasions with a boy to assist in it; and the second allegation is that in breach of that duty and that obligation the company failed to supply that boy. I have already pointed out in the course of the discussion that that entirely fails. There was not any such contract with the present Mr. Younghusband; there was an arrangement with him which had been followed out by his father for several years and by his father's workmen, not that the company should absolutely provide boys to assist but that they should be relieved from that obligation; and in place of it another was substituted, the new arrangement being that if a boy was available upon the premises they would give Mr. Younghusband the benefit of his services. My Lords, to state these propositions is to shew that as the case was originally stated it entirely and absolutely fails; and upon that ground I think the learned judge should have nonsuited the plaintiff.

My Lords, it is further to be remarked that this calamity to this unfortunate man, for whom one cannot but express pity, was really occasioned how? By his doing for Mr. Younghusband, his employer, the duty which Mr. Younghusband had undertaken to perform with reference to the company, that is, to do the shunting without the aid of a boy if there was not a boy whose services were at the moment available. It is also plain that there was an absence of any compulsion. Membery had been doing

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this duty without the aid of a boy for at least seven years before the time of this calamity. Very likely he had sometimes asked for, and sometimes got, and at other times did not get such services. Upon the occasion in question he asked for the services of a boy, possibly not unreasonably, but the answer which he got was in substance this, "I am not bound to give you one—if a boy becomes disengaged and is available I will send him to you, but at present I have no boy." There is no compulsion there. The plaintiff goes to do the work which he has been previously doing for many years and in the manner in which he has been previously doing it, and in the course of so acting he meets with a calamity.

I therefore rest my judgment upon this solid ground, that the learned judge at the trial ought either to have directed a verdict for the defendants or to have nonsuited the plaintiff—it is immaterial which—and I think that upon this ground the decision of the Court of Appeal ought to be affirmed. There are some other questions which are questions of difficulty and are not free from doubt, but upon which, as I do not think that they arise in the case, I forbear expressing any opinion.

LORD HERSCHELL:—

My Lords, I am of the same opinion. It is perfectly clear that in the present case the plaintiff has no right of action founded upon any contractual relation between him and the defendant company. But his case is that upon the occasion in question he was, with the assent or at the invitation of the defendants, upon their premises engaged about work in which they had an interest, and that he was damaged by their negligence. My Lords, I think that whenever there is a charge of negligence it is of the utmost importance, in order to avoid confusion and the danger of mistake, to remember that negligence implies the allegation of a breach of duty—a duty to take care—and to inquire at once what duty, if any, there was on the part of the persons charged with negligence to take care, and if there was any such duty, what was the extent of it at the time and under the circumstances which existed on the occasion when negligence is alleged to have been committed.

Now I do not for a moment doubt that there was a duty incumbent upon the defendants towards the plaintiff at the time when he was upon their premises. They were not without duty towards him. But it is not enough to arrive at the conclusion that there was a duty, or even a duty to take care; the extent of that duty requires to be determined. My Lords, I cannot doubt that they were bound to take care that the machinery, or appliances, or tackle of theirs, which he had to use in the course of his discharge of those duties in which they were interested, were in a reasonably fit and proper condition; and certainly if they were not in such a condition, and if the defect in them was unknown to the plaintiff, I cannot doubt that the plaintiff would have his remedy against them. In addition to that, I think they were under the duty to him, having invited him upon their premises, not to permit their premises to be in such a condition that he unwittingly might fall into a trap of the existence of which he, unacquainted with their premises, would be ignorant, by which he might sustain an injury. Further than that, it might be (and I confess that I should myself be disposed to think that it was) their duty to take due and reasonable care that in the carrying on of their business they did not subject him to unreasonable risk owing to the acts which they did in the carrying on of that business. If they were carrying on a dangerous business, and one which would subject people employed upon their premises for their benefit to risk, they must take reasonable care, as it seems to me, that they do not do any act (I emphatically use the word "act") which would endanger the safety of the persons who thus, to their knowledge, are employed about their business upon their premises.

My Lords, assuming all that in favour of the plaintiff, his case goes much further, because his allegation amounts, and must amount, to this, that the defendants were bound to take care to supply all the assistance, by means of the employment of other persons in addition to himself, which was necessary in order to free his employment from risk. That is really, when you analyse it, what the allegation of the plaintiff amounts to. Now I am unable to see any authority for such a proposition; nor am I able to see that it is to be derived by analogy from any decided cases,

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or that it is really supported by any principle. It is utterly unlike that which in *Woodley* v. *Metropolitan District Railway Company* (1) established the cause of action, namely, that you must take care that the acts which you do are not done in such a way as to endanger others. That is very far indeed from supporting the proposition that because a person is employed by somebody else upon your premises you come under the obligation to afford to him all the assistance of additional persons which will render his employment free from danger.

My Lords, it appears to me therefore that the plaintiff fails in making out the duty the breach of which alone would establish his case here and would enable him to maintain his action against the defendants.

My Lords, taking that view it appears to me to be unnecessary to consider the further question whether this is a case to which the maxim Volenti non fit injuria applies, although I do not mean for a moment to suggest that I entertain any doubt that in this case it would be applicable; and I should not have alluded further to the question but for some observations which have been made by my noble and learned friend opposite (Lord Bramwell), which no doubt will carry great weight, as all his observations do, with regard to the extent of this maxim. My Lords, it is certainly not necessary on the present occasion to determine the limits to the application of that maxim; but after what has been said I desire to say a word or two further with reference to it, because it is impossible to shut one's eyes to the fact that what my noble and learned friend opposite has stated is in conflict with opinions, at all events, which have been expressed by learned judges in the Courts below. I do not propose on the present occasion to express any opinion with regard to them. The point has not been argued before us, at all events exhaustively, inasmuch as it did not arise in the present case, and I do not desire to bind myself in any way in future, but I want to make distinct that which I consider to be left absolutely open by the present discussion. My noble and learned friend opposite has suggested that in no case can the maxim be said to be inapplicable unless the person who has done the act was under some

(1) 2 Ex. D. 384.

physical constraint or compulsion at the time when he did it, and that the consideration whether he would have come in conflict with his employer if he had refused to do it, or might have been dismissed from his employment, or would have been compelled to throw up his employment, is in no case a material consideration.

Now, my Lords, the question which has arisen in former cases and which may arise again appears to be this, whether a person employed in a manufactory, with the obligation on the part of his employer to use reasonable care to have his machinery in a suitable condition, who finds during the term of his employment and in the course of his employment that the machinery has, from want of care, become more dangerous than it otherwise would be, who nevertheless continues making the best of it and doing his work and performing his contract of service, would be precluded from maintaining an action against his employer for his undoubted breach of duty because there would be a complete answer to it on the part of the master in saying "You proceeded with your contract of service, and to fulfil the obligations into which you had entered to serve me, notwithstanding that you knew of this defect." My Lords, views have been expressed that in such a case the answer Volenti non fit injuria would not be a complete or sufficient answer on the part of the employer. I desire distinctly to say that nothing which has fallen from me to-day is to be considered as throwing any doubt upon that proposition. At the same time I refrain altogether from expressing any opinion upon it which could be supposed to be an affirmance of it. I desire to have the matter left open for argument if hereafter the question should arise and should be thought worthy of argument. It is sufficient to say that even supposing the doctrine Volenti non fit injuria could not be set up in such a case, that has no application to the present case where the circumstances which alone could prevent its being an answer do not exist.

LORD MACNAGHTEN:—

My Lords, I entirely agree in the result at which your Lordships have arrived.

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LORD HALSBURY L.C.:—

I desire to concur in what my noble and learned friend on my left (Lord Herschell) has said in reference to leaving open the question as to the limits of the doctrine Volenti non fit injuria. It was, in truth, upon that ground that I thought it right to call attention to the facts in this case affecting the employer and the employed.

Order appealed from affirmed, and appeal dismissed.

Lords' Journals 14th May 1889.

Solicitors for appellant: *Edward Boyle & Sons.*
Solicitor for respondents: *R. R. Nelson.*

[HOUSE OF LORDS.]

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ALEXANDER WILLIAM MACDOUGALL . APPELLANT;

AND

THOMAS KNIGHT AND HENRY KNIGHT . RESPONDENTS.

Libel—Privilege—Report of Proceedings in Courts of Justice—Publication of Judgment alone.

The decision of the Court of Appeal (17 Q. B. D. 636) affirmed, not for the reasons given by that Court, but because the findings of the jury disposed of all the questions which were properly raised at the trial, the points argued in the Divisional Court, in the Court of Appeal and in this House not having been properly raised at the trial.

By Lord Halsbury L.C.:—If the report of a judge's judgment or summing-up to a jury did not in fact give reasonable opportunities to the reader to form his own judgment as to what conclusion should be drawn from the evidence given, the publication of such partial, and in that respect inaccurate, representations of the evidence might be the subject of an action for libel to which the supposed privilege in what was said by a judge would be no answer. There is no presumption one way or the other as to whether a judge's judgment does or does not give such a complete and substantially accurate account of the matters upon which he is adjudicating as to bring it within the privilege. If it be so, it must be proved to be so by evidence, and certainly not inferred as a presumption of law.

APPEAL by the plaintiff from an order of the Court of Appeal affirming an order of the Queen's Bench Division which refused the plaintiff a new trial (1).

(1) 17 Q. B. D. 636.

The action was brought by the appellant against the respondents for libel in respect of a pamphlet published by the defendants. The pamphlet purported to be a verbatim report of the judgment of North J. in an action in the Chancery Division brought by the appellant against the respondents. The judgment contained passages defamatory to the plaintiff.

The material parts of the pleadings, the course taken at the trial before Huddleston B., the findings of the jury, and the nature of the proceedings in the Divisional Court and in the Court of Appeal upon the motion for a new trial, are stated in the judgment of Lord Halsbury L.C.

March 4, 5, 7. The *Appellant in person*:—

The judgment of the Court of Appeal is not sound law: it goes much further than any previous decision, and makes new law. It is admitted that the report of the judgment of North J. was fair and accurate, but the judgment contained libellous statements, not warranted by the facts as proved before North J. For such a publication there is no privilege: but even if there were the privilege is not absolute, as in the case of a judge or of counsel. To bring himself within the privilege the libeller must act bonâ fide, and not from malice. Here the defendants acted from a desire to injure the plaintiff: they circulated the judgment among their customers. It is not like the case of a newspaper, where there is a duty to inform the public. It may be for the public benefit that proceedings in courts of justice should be published, but this means the whole proceedings, not a partial and incomplete account. If reports of the whole proceedings are privileged, reports of a portion are not. Reports are not like magnets of which when divided indefinitely each part becomes a perfect magnet. This is not merely a report of part but it is by a party to the suit, and for such a publication no privilege has ever existed: *Coleman* v. *West Hartlepool Railway Company* (1). Privilege is, moreover, a personal attribute, a right in a particular person to do a particular thing which another person not similarly circumstanced has not: *Campbell* v. *Spottiswoode* (2). It may even

(1) 2 L. T. (N.S.) 766; 8 W. R. 734.

(2) 3 B. & S. 769; 32 L. J. (Q.B.) 185.

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be that a reporter of a newspaper would have been privileged in sending a report of the judgment to his employer, but the privilege does not extend to a volunteer: *Stevens* v. *Sampson* (1); and these defendants were volunteers, publishing libels not to inform the public but for trade purposes, and with the knowledge that the appellant was going to appeal from the judgment of North J. To obtain the protection of privilege not only must the occasion be privileged, but the person must act within the privilege, and it lies on him to shew that he does so act: *Milissich* v. *Lloyds* (2); which was not the case here. That the privilege claimed in the present case did not exist either in newspapers or in any other publication before the passing of the Law of Libel Amendment Act 1888 (51 & 52 Vict. c. 64) is apparent from the terms of that Act which is a general Act and which for the first time creates a privilege for the publication of proceedings in a court of justice. That privilege is confined to newspapers, and to those only "if published contemporaneously," s. 3. The onus was on the defendants not on the plaintiff to prove that the statements were justified by the facts as proved in evidence, and this they entirely failed to do. The statement of defence was bad, raising a bad plea of privilege, and the judge ought to have so directed the jury. This was misdirection. The learned judge ought to have asked the jury whether the words in which the defendants adopted the judgment were fair and true. The judgment of Lord Esher M.R. in the present case (3) is inconsistent with the law as previously existing and in particular with the judgment of Brett L.J. in *Stevens* v. *Sampson*. (4)

[He also referred to *Lewis* v. *Clement* (5) and *Lewis* v. *Levy* (6), and contended that the verdict was against the weight of evidence.]

Sir *E. Clarke* S.G. and *W. B. Odgers*, for the respondents, were not heard.

THE HOUSE took time for consideration.

(1) 5 Ex. Div. 53.
(2) 46 L. J. (Q.B.) 404.
(3) 17 Q. B. D. 636.
(4) 5 Ex. D., at p. 56.
(5) 3 B. & Ald. 702, 710.
(6) E. B. & E. 537.

April 8. LORD HALSBURY L.C.:—

My Lords, this is an action of libel in which the plaintiff complains of the defendants publishing a pamphlet purporting to be a verbatim report of the judgment of North J. pronounced in a cause in which the plaintiff sued the present defendants in the Chancery Division of the High Court of Justice. The statement of claim alleges that the libel complained of was the publishing of a pamphlet purporting to be a verbatim report of the judgment of North J., and as something turns in this case upon the question which the plaintiff sought to raise, it is material to consider the pleadings.

The passages of which the plaintiff complains are set out as the particulars of the statements and innuendoes forming the alleged libel, and the third paragraph of the defendant's defence is as follows:—"(3) The defendants are auctioneers and upholsterers, carrying on business at Bath, and having a large number of customers resident in Bath and the neighbourhood. The plaintiff brought the said action against the defendants in the Chancery Division of the High Court of Justice charging the defendants with breach of contract, misrepresentation, and breach of faith. The said action was assigned for trial to the Honourable Mr. Justice North, who, after a trial which lasted five days, gave judgment in favour of the defendants. The said pamphlet is a fair, accurate, and honest report of the said judgment of the Honourable Mr. Justice North, and was published by the defendants bonâ fide, and with the honest intention of making known the true facts of the case, and in order to protect their reputation and their said business, and in reasonable self-defence, and without any malice towards the plaintiff."

The plaintiff replied by joining issue on the defendants' defence, and these were the issues which came before Huddleston B. and a jury to be determined.

The publication of the pamphlet was admitted, and it was sought to be justified as a fair, accurate, and honest report of the judgment of North J., and was alleged to be published by the defendants bonâ fide and with the honest intention of making known the true facts of the case, and in order to protect their

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reputation and their said business, and in reasonable self-defence and without any malice towards the plaintiff.

The jury found all the questions involved in these issues in favour of the defendants. They found that the pamphlet was a fair, accurate, and honest report of the judgment of North J.; they found that it was published by the defendants bonâ fide, and with the honest intention of making known the true facts of the case in order to protect their reputation and in reasonable self-defence, and they found that the publication was not malicious.

Now it is impossible to deny upon the issues thus raised upon the pleadings, that the judgment must be for the defendants, or that if the third paragraph of the defence is not an answer to the action a motion should have been made for judgment for the plaintiff, notwithstanding that there was a finding by the jury upon the issues in favour of the defendants. No such motion was made, but the notice of motion to the Divisional Court states as the ground of the application to that Court for a new trial, that the judge misdirected the jury in telling them that the occasion was privileged, and in telling them that if the pamphlet was a fair, accurate, and honest report of the judgment of North J., its publication was privileged; and in not telling them that to be privileged it must be a fair, accurate, and honest report of all the proceedings at the trial: Also on the ground that the judge improperly ruled that the plaintiff was not entitled on the pleadings to object to the third paragraph of the defence as bad in law: Also on the ground that the judge improperly refused to give the plaintiff leave to amend his reply by adding that he objected to the third paragraph in point of law, and also on the ground that the verdict was against the weight of evidence.

None of these points seem really to have been argued either before the Divisional Court or the Court of Appeal except the point as to the judgment being a separate and independent portion of the proceedings at the trial which need not disclose all that took place at the trial.

My Lords, I think several questions which might have arisen as to that point are concluded by the conduct of the parties at

the trial, and by the course they took before the Divisional Court and the Court of Appeal.

Huddleston B. (page 142 of the appendix) says: "What I shall ask the jury in substance is this: The plaintiff complains of what he calls a libel. The defendant says, first of all, that the pamphlet is a verbatim report of the judgment of Mr. Justice North; and then next he says, in substance, the words were in fact spoken by the Hon. Mr. Justice North in delivering judgment. Those are the words complained of. He does not say that the whole of the book is put in the statement of claim; he merely says the passages. Then the defendant has pleaded that these passages were in fact uttered by Mr. Justice North. Then he says that they are 'auctioneers and upholsterers carrying on business at Bath, and having a large number of customers resident in Bath and the neighbourhood. The plaintiff brought the said action against the defendants in the Chancery Division of the High Court of Justice, charging the defendants with breach of contract, misrepresentation, and breach of faith. The said action was assigned for trial to the Hon. Mr. Justice North, who after a trial which lasted five days, gave judgment in favour of the defendants.' Those facts seem to be admitted. Then they go on to say this: 'The said pamphlet is a fair, accurate, and honest report of the said judgment of the Hon. Mr. Justice North, and was published by the defendants bonâ fide, and with the honest intention of making known the true facts of the case, and in order to protect their reputation and their said business, and in reasonable self-defence, and without any malice towards the plaintiff.' Then, if the jury say that in their opinion that is so, there is a verdict for the defendants. That is the question."

Now I think it was the duty of those who are suggesting that other questions ought to have been asked and other issues raised to have intervened at this point, and to have requested Baron Huddleston definitely and distinctly to put the questions that they now insist ought to have been submitted to the jury. But nothing of the sort was done. The parties took their chance of what the jury would do, and I think nothing could be more mischievous than to allow litigants to raise new questions when, under such circumstances, the jury have decided against them.

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If such a course were permitted no end could possibly be found for litigation. But I do not think it is alone from this omission that the course pursued by the plaintiff prevents him from complaining.

On a careful review of what passed at the trial, I think that the plaintiff did mean to deny the verbatim accuracy of the report of the judgment, and I think further that the effort which was made at the trial and partly renewed at your Lordships' bar, was not so much to contest the accuracy of the report as a report of what actually took place as to shew that North J. had drawn erroneous conclusions from the facts put in proof before him.

My Lords, the ground on which the privilege of accurately reporting what takes places in a court of justice is based is that judicial proceedings are in this country public, and that the publication of what takes place there, even though matters defamatory to an individual may thus obtain wider circulation than they otherwise would, is allowed because such publication is merely enlarging the area of the court, and communicating to all that which all had the right to know.

I am not prepared to admit that the judgment of a learned judge must necessarily be privileged. It is obvious that a partial account of what takes place in a court of justice may be the exact reverse of putting the person to whom publication is made in the same position as if he were present himself. If the evidence of a witness containing matter defamatory to an individual were published, and the cross-examination which shewed the witness to be a person unworthy of belief were suppressed, it would obviously be a partial and inaccurate account of what took place; and if a learned judge's judgment or summing-up to a jury did not, in fact, give reasonable opportunities to the reader to form his own judgment as to what conclusion should be drawn from the evidence given, I think the publication of such partial, and in that respect inaccurate, representations of the evidence might be the subject of an action for libel to which the supposed privilege in what was said by a judge would be no answer. Nor do I think there is any presumption one way or the other as to whether a judge's judgment does or does not give such a complete and substantially accurate account of the matters upon

which he is adjudicating as to bring it within the privilege. If it be so, it must be proved to be so by evidence, and certainly not inferred as a presumption of law.

But in this case it is very obvious that the learned judge was never asked to submit any such questions as are now insisted on to the jury. The plaintiff was himself cross-examined as to whether there was any evidence in the cause not referred to in what is called the summing-up, and I think he wholly failed to suggest that the judge's judgment was erroneous in omitting to notice any evidence given in the cause; he complains of it not because it did not fairly represent the evidence which in fact had been given, but because the learned judge did not draw from the evidence that was given the same conclusions which Mr. McDougall insists he should have drawn.

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Now the question whether or not the judgment did truly represent all the evidence which had been given was a question of fact to be tried, if tried at all, before the jury with the witnesses there and with the documents before them. It is too late either in the Divisional Court, in the Court of Appeal, or in this House, to suggest that that question should have been submitted to the jury when no such suggestion was made at the trial itself.

It seems to me that it would be most unjust to allow such a question to be raised at so late a period, and thus to allow a new case to be started by a plaintiff who had failed upon the questions of fact upon which he had elected to stand.

It seems to me that substantial justice was done by the course Huddleston B. pursued, and I therefore think this appeal should be dismissed with costs.

LORD WATSON:—

My Lords, I concur in the judgment which has been moved; and I do so on this ground only. The plaintiff joined issue with the defendants upon the defence stated, which was affirmed in all points by the jury, and, in my opinion, no cause has been shewn for disturbing their verdict. I understand all your Lordships to be of opinion that whether the plea stated by the defendants is good or bad, it must receive effect when affirmed by the jury, because its validity has not been competently challenged in these

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proceedings. In stating his objections to the plea, the appellant discussed various questions of delicacy and importance relating to the privilege of reporting judicial proceedings. Seeing that these questions are not raised for decision, and that we did not hear the respondents' counsel, I purposely abstain from any expression of opinion with regard to them.

LORD BRAMWELL:—

My Lords, I agree with the opinion of the noble and learned Lord on the woolsack, and with the reasons that he has given for it; but I wish to say a few words, partly in justice to the plaintiff and partly to prevent the possibility of the decision of this House being mistaken, though I do not think it ought to be after what the noble and learned Lord has said.

The case is shortly this: The plaintiff brought a former action against the defendants in the Chancery Division. North J. rightly or wrongly, in the course of his judgment in that case, expressed an opinion which was not creditable to the plaintiff, and which when published might be the subject-matter of an action for libel. Upon the same materials the Court of Appeal afterwards, though they affirmed the judgment of North J., stated their dissent from the comments which he had made unfavourable to the plaintiff's character in the matter. The defendants in that action, who are also the defendants in this action, before the judgment of the Court of Appeal had been given, published the judgment of North J. with the disparaging remarks in it to which I have referred, and distributed, I think, 1500 copies of it to their own customers and patrons, as they called them, and they did not accompany the publication of that judgment with the publication of the evidence.

Now it is perfectly clear that upon that statement they did not give the plaintiff that chance of a favourable opinion being taken of his conduct in the case which they would have done if they had published the evidence, which when it was before the Court of Appeal caused the learned judges of that Court to entertain the favourable opinion to which I have referred. It is perfectly clear, therefore, that even if the judgment was correctly published—and I have no doubt it was, it was so found by the

jury—it was not a publication of all the circumstances of the case such as to enable persons to form, possibly, opinions unfavourable to the plaintiff but, possibly, opinions favourable to him. Now this was done by the defendants, not as purveyors of news; not that I mean to say a newspaper has any particular privilege except so far as it may be given by statute. It was not published by them for that purpose, but it was published by them for the sake of vindicating, as they said, their character with their customers.

Now what I wish to say in point of law is this—the noble and learned Lord on the woolsack has expressed his doubt upon it already—that I am by no means prepared to say that under those circumstances there was not a cause of action on the part of the plaintiff against the defendants for libel for the publication of this judgment unaccompanied by the evidence. It is to be observed that there is no justification that what North J. said was true; the only statement in the statement of defence is that the report of the judgment was accurate, and was published without malice. I wish to guard against its being supposed that this House is holding that there was not a subject-matter of an action for libel there.

Then why is it that the plaintiff has not succeeded? For the reason that has been given by the Lord Chancellor. After the verdict of the jury had been given the objection should have been taken: "But I am entitled to judgment, because although the jury have found the facts in issue against me, it is not stated in the defence that the pamphlet was a fair report of the proceedings at the trial, but merely a fair report of the judgment." That is the course that should have been taken, and if the learned judge had refused to give judgment for the plaintiff, then an application should have been made to the Divisional Court, and their refusal, if they had refused, should have been the subject-matter of an appeal upon that ground. But the point has never been so taken. There has been some curious suggestion that in some way or other the jury ought to have been asked a question which, in truth, was a question of law. The consequence is that the true ground for maintaining the plaintiff's action has never been put before any tribunal as it ought to have been. It has been put,

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as I say, not as an objection to the statement of defence, but in some way, not very intelligibly, that the learned judge did not leave some question to the jury which, in reality, if it was anything was not a question raised upon the pleadings, but was a question of law.

LORD FITZGERALD:—

My Lords, the pleadings and the facts have been already summarised. The replication "joins issue on the defence," but it contains no averment that the defence is insufficient in law, and, on the contrary, as the defence consists entirely of matters of fact, the replication imports that if the facts relied on in the defence should be established in proof, the defence is good in law.

The defendants' pamphlet contains the paragraphs complained of in the statement of claim, which undoubtedly are libellous of the plaintiff and sufficient to maintain his action if the publication be not justified, or protected, or excused.

The defence admits the publication of the pamphlet, but alleges that the pamphlet is a fair, accurate, and honest report of the judgment of North J. in the Chancery action and that it was published in good faith and without malice. That is the substance of the defence, though the pleading comprises some other allegations, not absolutely necessary, but which go to rebut any inference of malice and to shew the defendants' interest in the matter, and that in the publication they were not exceeding the limits of privilege. The defence then consisted of two main allegations, viz. (1) that the report gave accurately what North J. did actually say in his judgment on the Chancery action; (2) that the pamphlet was published without malice. This cause came to trial, and there was a perplexing contest as to what ought to be received in evidence and what rejected; but finally considerable latitude was given by the learned judge, and out of the tangle and confusion, created principally by the plaintiff's examination, it appeared plainly that the plaintiff failed to establish that the pamphlet was unfair or inaccurate, or that any material part of the evidence had been omitted in North J.'s summary. The defendants' evidence proved that it did contain a fair, accu-

rate, and honest report of what North J. had said in his judgment in the Chancery cause.

If it was expedient to enter on the question, I might point out that although the plaintiff got the utmost latitude from Huddleston B., yet he failed in his contention to establish that the judgment of North J. did not contain a full summary of the proceedings and evidence in the trial before him.

The jury found affirmatively that the pamphlet was a fair, accurate, and honest report of that judgment, and was published by the defendants bonâ fide, with the honest intention of making known the facts of the case, in order to protect their reputation and in reasonable self-defence; and also found negatively that there was no malice. Thereupon judgment was given for the defendants.

I concur with the judge that there ought to have been then an end of this case, but the plaintiff's counsel had in the course of the trial put it rather doubtfully that the defence was not good in law. After the close of his case he says "Your Lordship understands I do not admit that this is a good plea of privilege." The plaintiff's counsel does not appear to have taken any objection to the summing-up, or asked for any specific direction in point of law.

I collect from what occurred that the allegation of the plaintiff was that a publication of the judge's judgment alone could not raise a justification; it must be a report of the whole proceedings at the trial; that such a report, to be full and to be justified, should have contained the whole proceedings and the evidence at the trial, which had been dragging along for many days before the judge pronounced his judgment.

Now let us see what this judgment of North J. really was. It was not exactly similar to a summing-up of a judge to a jury who have heard the evidence, where he is acting in their aid as to the findings in fact which they are to determine, and directing them on such questions of law as have arisen. North J. without a jury had the function of deciding on the facts and on the law, and had necessarily to review the evidence and state his conclusions on the facts. His decision on both facts and law was final between the parties unless reversed or varied on appeal. The

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plaintiff did appeal, both on fact and in law, and he has failed in the Divisional Court, in the Court of Appeal, and before your Lordships.

North J. was therefore pronouncing and did pronounce what was and is the final decision on the rights of the parties in that very complicated suit, and so far as they could be then determined at that stage of the suit. But before announcing his decision he precedes it by a review of the trial, and summarises the pleadings, the evidence and the issues, and also gives his reasons at large for the judgment he is about to pronounce. The reasons for the judgment and the judgment itself are quite distinct, though together usually described as the judgment of the judge.

If the decision of the judge, as pronounced by him, and subsequently recorded in his order or decree, had been accurately published, it would not be libellous unless the privilege which protects such a publication had been displaced by proof of actual malice.

My Lords, the appellant pressed on your Lordships that the defence (assuming it to be true in fact) presented no answer to the action, and he claimed to have judgment entered for him. He ought to have raised that question before the Divisional Court but did not do so; but I assume for the purpose of this appeal that if the pleading presents no legal defence, then even at this stage of the cause the appellant's contention should prevail.

The privilege which attaches to the publication of the proceedings of Courts of Justice rests on the foundation that the law of this land is administered publicly and openly, and its administration is at once subjected to, and protected by, the full and searching light of public opinion and public criticism. The openness and publicity of our courts forms one of the excellences of our practice of the law, and admits of exception only in rare cases of such a character that public morality requires that the proceedings should be in camerâ wholly or in part. This openness and publicity was at one time peculiar to the law of England.

Barrington, in his observations on the statutes, and speaking

of our open courts, says: "I do not recollect to have met in any of the European laws with an injunction that all causes shall be heard 'ostiis apertis,' except in those of the Republic of Lucca. In Scotland, by a statute of William and Mary, all causes must be tried with open doors, rape and the like being excepted." And Mr. Emlyn, in his preface to his edition of State Trials, says: "In other countries the Courts of Justice are held in secret; with us publickly and in open view; there the witnesses are examined in private, and in the prisoner's absence; with us face to face, and in the prisoner's presence."

From this practice of the law the principle has been deduced, and in modern times expanded, that as a general rule the publication of a fair and bonâ fide report of the proceedings of a Court of Justice is primâ facie to be protected, and I may add that, speaking for myself alone, I am not disposed to narrow or limit that privilege. So far the law is not contested. But the appellant contends, in this particular case, that the occasion is not privileged, because the defendants did not publish the whole trial, but only the judgment.

My Lords, I do not intend to indulge in any abstract propositions; there is danger in doing so, and especially where the appellant has not been represented by counsel before your Lordships. No authority has been brought before your Lordships for the assertion that the privilege cannot exist where the publication is of a part only of the proceeding. *Lewis* v. *Levy* (1) is directly contrary. Where, as in the case before North J., the trial had been completed, and the publisher, in his publication, gives only the last scene, i.e., the decision, with the judge's reasons for that decision, he may incur considerable risks, e.g., he may exceed the limits of privilege, and he leaves himself open to the imputation that he has adopted the plan of a partial publication as the vehicle of malice. In the present case the defendants are freed from those dangers by their defence, which is now to be taken as true in all its facts.

My Lords, the trial of the Chancery cause before North J. is stated to have occupied five days, and his judgment and reasons were delivered on a subsequent day, and I can entertain no doubt

(1) E. B. & E. 537.

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that in this particular case the publication of that decision, preceded by the judge's summary of the case and the evidence with his own reasons, comes primâ facie within the protection afforded to the publication of proceedings of public Courts of Justice, and that to obtain that protection it was not necessary to give a report of all prior proceedings at the trial.

My Lords, I confine my judgment to the particular case before your Lordships' House. Your Lordships will find some more extensive propositions expressed in the reasons of the Courts below, and discussed here. I do not mean to express dissent, but as to some of them that it would be desirable that they should be fully and pointedly discussed before your Lordships should be called on finally to accept them.

LORD MACNAGHTEN:—

My Lords, I concur in the motion proposed, but I prefer to do so upon the grounds which have been expressed by my noble and learned friend opposite (Lord Watson).

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 8th April 1889.

Solicitor for appellant: *Hermann H. Myer.*

Solicitors for respondents: *Torr, Janeways, Gribble, & Oddie, for Payne & Fuller, Bath.*

[HOUSE OF LORDS.]

WILLIAM HAMILTON AND JOHN HAMILTON . . . . . } APPELLANTS;

AND

WILLIAM BAKER . . . . . RESPONDENT.

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Disbursements—Master of Ship—Maritime Lien for Necessaries—Admiralty Court Act 1861 (24 *Vict. c.* 10) *s.* 10—*Admiralty Court Act* 1840 (3 & 4 *Vict. c.* 65) *s.* 6—*Merchant Shipping Act* 1854 (17 & 18 *Vict. c.* 104) *s.* 191.

The Admiralty Court Act 1861 (24 Vict. c. 10) does not give the master a maritime lien on the ship for disbursements.

The decision of the Court of Appeal (12 P. D. 158) reversed. *The Glentanner* (Swa 415); *The Mary Ann* (Law Rep. 1 A. & E. 8); *The Feronia* (Law Rep. 2 A. & E. 65); and *The Ringdove* (11 P. D. 120) overruled.

APPEAL from a decision of the Court of Appeal (1).

The respondent was the master of the steamship *Sara*, the owners of which had in 1884 mortgaged her to the appellants but had kept possession. At St. Vincent in March 1885 the respondent drew a bill upon the owners for necessaries (coals and port charges) to enable the ship to complete her voyage home. The bill was dishonoured by the owners. The appellants having taken possession of the ship, she was sold for less than the mortgage debt.

After the sale the respondent being liable on the bill brought this action in rem against the owners in the Admiralty Court for the amount of the bill. The owners did not appear in the action, but the appellants intervened as mortgagees and defended the action on two grounds; first, that a master has no maritime lien for disbursements, and secondly that a mere liability on a bill is not a disbursement.

Butt J. determined both points against the defendants and gave judgment for the plaintiff for the amount claimed. This decision was affirmed by the Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ.) (1). The defendants brought the present appeal.

(1) 12 P. D. 158.

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1888. Nov. 30, Dec. 3, 4. *Finlay* Q.C. (*A. E. Nelson* with him) for the appellants:—

Two questions arise: first whether a master has a maritime lien for disbursements; secondly whether (assuming he has) his liability on a bill drawn for necessaries is a disbursement. On the first and principal question the Court of Appeal went upon the ground that for many years mortgagees have in consequence of the decision in *The Mary Ann* (1) recognised in practice the priority of the master's lien for necessaries, and that it would be unjust to those who had so paid not to make other mortgagees pay. But the doctrine of communis error is only applicable where a certain meaning has been given to an instrument and parties are supposed to have contracted on that basis. The claim to a maritime lien is founded on the Admiralty Court Act 1861 (24 Vict. c. 10) s. 10 (2), "The High Court of Admiralty shall have jurisdiction over any claim by a seaman . . . . for disbursements made by him on account of the ship." But conferring on a Court jurisdiction to determine the rights of parties does not alter the nature of those rights. That was decided in *The Henrich Björn* (3) upon precisely similar words in the Act of 1840 (3 & 4 Vict. c. 65) s. 6. The anomalies which would exist if such a lien existed are there pointed out. It would be strange if the words "shall have jurisdiction" confer no lien in the Act of 1840, and do confer one in the Act of 1861. The practice relied on by the Court of Appeal arose after the decision in *The Mary Ann* (1) where Dr. Lushington for the first time held that a master had a maritime lien for disbursements under the Act of 1861. But that decision was based upon his own erroneous decision in *The Glentanner* (4) where he held that under the Merchant Shipping Act

(1) Law Rep. 1 A. & E. 8.

(2) The Admiralty Court Act 1861 (24 Vict. c. 10) s. 10:—"The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship. . . ."

Sect. 35: "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam."

(3) 11 App. Cas. 270.

(4) Swa. 415.

1854 s. 191 if in a suit by a master for his wages any right of set-off or counter-claim was set up the master had a maritime lien for disbursements as well as for wages, though sect. 191 gave it in terms only for wages. If sect. 191 did, as Dr. Lushington held, confer a maritime lien for disbursements it would also confer one for all debts owing to the master by the owners on matters entirely extraneous to the ship, for the Court has jurisdiction to "adjudicate upon all questions and settle all accounts then arising or outstanding and unsettled between the parties." The cases subsequent to *The Mary Ann* (1) only followed that decision and do not add weight to the authority: in most of them the lien being assumed; e.g. *The Edward Oliver* (2); *The Feronia* (3); *The Marco Polo* (4); *The Limerick* (5); *In re Rio Grande Do Sul Steamship Company* (6); *The Fairport* (7). In *The Ringdove* (8) Sir J. Hannen held himself bound by the current of authority, though not satisfied with the reasoning. There may be a right to sue the ship and yet no maritime lien: *The Pacific* (9); *The Two Ellens* (10); *The Pieve Superiore* (11); *The Rio Tinto* (12).

As to the second point, the lien (if any) for "disbursements" can only be for moneys paid, not for liabilities. It was so held in *The Chieftain* (13) and *The Edwin* (14). The dictionary meaning of the word is to "spend or lay out money;" Johnson; to "take out of the burse or purse: to expend, defray expenses, costs and charges;" Richardson. There is no idea of credit in the word. If such a claim be allowed the master can create a lien to any extent by incurring liabilities for necessaries, though he could not by a bottomry bond.

Sir *Walter Phillimore* and *J. Gorell Barnes* Q.C. for the respondent:—

The principal question, whether there is a maritime lien for

(1) Law Rep. 1 A. & E. 8.
(2) Law Rep. 1 A. & E. 379.
(3) Law Rep. 2 A. & E. 65.
(4) 24 L. T. (N.S.) 804; 1 Asp. Mar. L. C. (N.S.) 54.
(5) 1 P. D. 292.
(6) 5 Ch. D 282.
(7) 8 P. D. 48.
(8) 11 P. D. 120.
(9) Br. & L. 243.
(10) Law Rep. 4 P. C. 161.
(11) Law Rep. 5 P. C. 482.
(12) 9 App. Cas. 356.
(13) Br. & L. 104.
(14) Br. & L. 281.

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disbursements, is of great mercantile importance and arises or may arise in every foreign port entered by a British ship where the master has to order necessaries to enable the ship to complete her voyage. On the authorities it is at the least a matter of considerable doubt. A Court should therefore incline to support decisions upon the authority of which hundreds of claims have for many years been settled in the Admiralty Court. If the master had instead of drawing a bill given a bottomry bond it would have had priority over the mortgagees. This he might have done in the present case, the things ordered being necessaries for the completion of the voyage and the master being without credit. But there are objections to bottomry bonds: they are more expensive, and they bind the cargo. The electric telegraph has almost killed bottomry bonds. These objections do not exist in the case of bills drawn by the master, and from a commercial point of view it is very desirable that the lien claimed should prevail.

A maritime lien was given to the master for his wages by 7 & 8 Vict. c. 112 s. 16 in the case of the owner's bankruptcy. To remedy the injustice which arose where the owner had a larger claim against the master than the master had for his wages, the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) s. 191 was passed; see *The Julindur* (1). That section extended the lien to all cases, and where a set-off or counter-claim was made so that the whole accounts could be gone into a maritime lien was by implication given for the master's disbursements. In that section "accounts" must mean accounts relating to the ship, not private or extraneous accounts between the master and the owners not relating to the ship, for it could not mean all questions without limit, e.g. a suit for specific performance. So reading the words there is nothing unreasonable in the lien. But this lien only existed when a set-off or counter-claim was made, and to remedy this inconvenience came the Act of 1861, which by s. 10 impliedly confers a lien for disbursements in all cases. The intention to confer a lien becomes more apparent by comparing the language of s. 10 with that of ss. 4, 5, 6, 7, and 8. The Act gives jurisdiction in three cases: damage done by any ship,

(1) 1 Ecc. & Ad. (Spinks) 71, 74.

wages whether due under a special contract or otherwise, and disbursements. It gives jurisdiction expressly, and therefore by implication the rights without which that jurisdiction was never exercised. This must have been so in collisions, for it is impossible to suppose that if a collision occurred on the high seas there would be a lien, and no lien if it occurred within the body of a county: see per Lord Bramwell in *The Henrich Bjorn* (1). Then if a lien as to collisions, why not as to disbursements? The defective jurisdiction which the Act of 1861 was intended to remedy is referred to by Dr. Lushington in *The Harriet* (2). It is said that some proceedings in rem are independent of maritime lien, but only two instances can be given, "actions between co-owners, of possession and of restraint;" see the argument for the respondents in *The Henrich Bjorn* (3), and Williams and Bruce's Admiralty Practice, 2nd ed. pp. 25, 26. Speaking generally, in all cases where the Court of Admiralty has jurisdiction in rem, there a maritime lien exists: *The Bold Buccleugh* (4). It is reason and good sense that if the mortgagee does not take possession but allows the mortgagor to keep possession, the mortgagee should be postponed to the claim for necessaries, he having had the benefit of the disbursements without which he could not have received the freight or realised his security. A mortgagee is bound by a beneficial charter entered into by the mortgagor in possession: *Collins* v. *Lamport* (5).

[They also discussed all the cases cited contra, and in addition referred to *The Daring* (6)].

[LORD HALSBURY referred to *Bristow* v. *Whitmore* (7).]

As to the second point, the master has paid for the necessaries when he has drawn the bill, for he is liable on it. The decisions in *The Chieftain* (8) and *The Edwin* (9) were reviewed in *The Ferenia* (10) and *The Red Rose* (11). They are also inconsistent

(1) 11 App. Cas. at p. 282.
(2) Lush. 285, 291.
(3) 11 App. Cas. at p. 275.
(4) 7 Moo. P. C. 267, 284.
(5) 4 D. J. & S. 500; 34 L. J. (Ch.) 196.
(6) Law Rep. 2 A. & E. 260.
(7) 9 H. L. C. 391.
(8) Br. & L. 104.
(9) Br. & L. 281.
(10) Law Rep. 2 A. & E. 65.
(11) Law Rep. 2 A. & E. 80, n.

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with the decisions in *The Limerick* (1), *In re Rio Grande Do Sul Steamship Co.* (2), and *The Fairport* (3).

A. E. Nelson in reply:—

If the Act of 1861 confers the lien contended for the law will be different not only to that administered in Scotland and Ireland, but to that administered in the forty-five places referred to in the schedule to the Vice-Admiralty Courts Act 1863, 26 & 27 Vict. c. 24; see s. 10.

THE HOUSE took time for consideration.

1889. May 27. LORD HALSBURY L.C.:—

My Lords, in this case the plaintiff William Baker brought an action in rem against the owners of the steamship *Sara* as defendants. The plaintiff claimed for disbursements which had been supplied upon his order as master of the steamship *Sara* at St. Vincent in March 1885.

The appellants intervened in the action, and their case was that they had taken a mortgage of the vessel on the 23rd of April 1884; and stripped of the other questions which have been disposed of by the evidence, the only real question is whether under the circumstances I have stated, the plaintiff Baker had a maritime lien for his disbursements. I believe the question might be even more compendiously stated by saying, that the question is whether the decision of Dr. Lushington in the case of *The Mary Ann* (4) can be supported by your Lordships' House.

Now, two propositions are absolutely certain: one is that before 1854 no such lien could be claimed, and the other that neither the Act of 1854 nor the Act of 1861 created such a lien in express terms. The arguments addressed to your Lordships, singularly enough, are in some of their aspects very effectively answered by some of the passages in the very judgment relied on.

It is not true to say that the mere enacting by the Admiralty Court Act that the High Court of Admiralty shall have jurisdiction purports to confer a maritime lien. Dr. Lushington himself

(1) 1 P. D. 292, 411.
(2) 5 Ch. D. 282.
(3) 8 P. D. 48.
(4) Law Rep. 1 A. & E. 8.

says that the same enactment provides that the proceedings in that Court may be either in rem or in personam. Further, he says that there is a clear distinction between a maritime lien and a claim the payment of which the Court has power to enforce from the ship and freight.

The whole of the learned judge's reasoning upon which his judgment ultimately turned was this; he says: "Supposing before this Act this Court had jurisdiction to deal with any subject-matter in certain cases and those only, and that in those cases the Court was bound to recognise the existence of a maritime lien, and supposing that by this Act the legislature extended the jurisdiction so as to enable the Court to deal with the same subject-matter in other cases also, then I think that in such other cases and with regard to the same subject-matter, the legislature must be taken (notwithstanding the absence of any express words) to have intended to create a maritime lien."

This is the whole of the reasoning upon which the judgment depends, and it is necessary to examine how it justifies the judgment when applied to the subject-matter with which we are dealing. Is it true that the Court was bound to recognise a maritime lien for disbursements before the statute? Certainly not. The example given of the master here is certainly a very strange one, since it is in a sense expressly given by the combined operation of 7 & 8 Vict. c. 112 and the 191st section of the Merchant Shipping Act 1854.

The learned judge himself points out that the 10th section of the Act which he was construing cured the difficulty of forum in such a case, by expressly giving the Admiralty jurisdiction to deal with any lien the master might have, and we have already seen that by the two former statutes the lien for the wages was actually and in terms created. But how does the providing the forum for the special lien already created lead to any inference that the giving jurisdiction does create a lien?

It is true that where the contract was under seal, or where the terms were special and unusual, the Admiralty Court had no jurisdiction, because it was said that the sailor's ordinary contract with the master was presumed to be on the credit of the ship, whereas other contracts were said to be on the personal credit of

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the owners; but whatever may be said as to the practical abolition of the distinction as regards wages "earned on board the vessel" under a special contract or an ordinary contract, what relation has such a provision to the case of disbursements?

Where the subject-matter, whether collision or seamen's wages, had in its own nature a maritime lien, I can well understand that the extension of the jurisdiction to a case where the nature of the subject-matter was the same, e.g. collisions within the body of the county, carried with it, as inherent in the nature of the thing itself, a maritime lien, and it may well be argued that the legislature did not intend to alter the incidents of the subject-matter thus submitted to a new jurisdiction. The learned judge's own reasoning seems to me to lead to a different conclusion from that at which he arrived.

Nor does the power to enter into the whole account given by the section already referred to appear to me to carry the matter any further. The learned judge himself uses the most powerful argument against his own decision. A maritime lien, he says, springs into existence the moment the circumstances give birth to it, as damage, salvage, wages; and yet it is said here that whether there is a lien or not is to depend upon whether the owners set up by way of set-off counter-claims by them against the master.

I share with many judges the difficulty of following the reasoning, and I am unable therefore to adopt the conclusions; but I do feel very strongly what has been forcibly expressed by Sir James Hannen in *The Ringdove* (1) and by the Master of the Rolls in the present case, namely, the practical adoption in actual business of the decision in *The Mary Ann* (2), and I have striven to see whether it was possible to give effect to that practice; but I cannot omit to consider that we are construing comparatively modern statute law and not business documents merely. Your Lordships' House is asked to sanction a canon of construction that may extend more widely than the particular case now dwelt with, and I am therefore constrained to move your Lordships that the judgment be reversed, and this appeal allowed.

(1) 11 P. D. 120.

(2) Law Rep. 1 A. & E. 8.

LORD WATSON:—

My Lorls, there is but one substantial question raised in this appeal. Has the master of a British ship a maritime lien, enforcible in the Court of Admiralty, for disbursements made by him, on account of ship, in a foreign port?

By the common law of England the master's claims, whether for wages or disbursements, did not carry with them any hypothecary interest in the ship; and, inasmuch as they rested upon contract alone, were not cognisable in the Admiralty Courts. The Merchant Shipping Act 1854 gave the master in express terms the same lien which other seamen had for recovery of their wages by law or custom; and also conferred upon the Admiralty Court a limited jurisdiction to entertain other claims at his instance; whilst the Admiralty Court Act 1861 extended its jurisdiction to any claim for disbursements made by him on account of ship. Neither statute expressly attaches a lien to his claims for disbursements; but it is said that the effect of their provisions is to give him the right by implication.

Sect. 191 of the Act of 1854, which creates a lien for the master's wages, concludes thus: "If in any proceeding in any Court of Admiralty or Vice-Admiralty, touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due."

I am willing to assume that the accounting which these provisions contemplate must be confined to items connected with the ship, and I do not doubt that a claim for disbursements is one which the master might competently prefer, in answer to any set-off or counter-claim pleaded in defence to his suit for wages. But it does not appear to me to be a necessary or natural inference, that the legislature meant to attach a maritime lien to every demand which a master may competently make in the accounting, or to his claim for disbursements. When a variety of personal and unsecured claims are dealt with in a single clause, and, it is expressly declared that one of them shall bear a lien, there arises a strong presumption that a similar

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privilege is not to attach to the rest; and that presumption cannot be overcome except by very plain implication.' A proper right of lien constitutes a nexus upon the ship, which suâ naturâ must exist and accompany the claim from its inception; and, it is very improbable that the legislature should have intended to create a maritime lien, which does not come into existence unless and until a plea of set-off is judicially stated in answer to a claim for wages. The strongest argument to the contrary is to be found in the suggestion that sect. 191 necessarily contemplates a decree in rem, which is said to imply the existence of a maritime lien. But the clause enacts that, in the event of the balance of accounts being against the master, the Court is to direct payment, which cannot be effected by a decree in rem; and, so far as I am aware, there is no authority for the proposition that there must be a proper maritime lien for every claim which the legislature has made enforcible against the ship.

The Act of 1861 provides (sect. 10) that the Admiralty Court shall have jurisdiction "over any claim by the master of a ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship." But it also provides (sect. 35), that "the jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam." In the face of that enactment it would be difficult to hold that the submission of a merely personal or contractual claim to the jurisdiction of the Court of Admiralty converted it into a real right against the ship from the time when it came into existence.

In *The Mary Ann*, which was decided by Dr. Lushington in 1865 (1), that learned judge held that the master's claim for disbursements on account of ship does bear a proper maritime lien. In arriving at that result, I do not think the learned judge relied solely upon the provisions of the Act of 1861, although there are observations in his judgment which might admit of that construction. His reasoning leads me to infer that, if before the passing of the Act, claims for disbursements had been wholly excluded from the jurisdiction of his Court, and had been unaccompanied by a lien, Dr. Lushington would have

(1) Law Rep. 1 A. & E. 8.

held that the provisions of the Act were, per se, insufficient to create the right. He said (1): "There is a clear distinction between a maritime lien and a claim the payment of which the Court has power to enforce from the ship and freight. A maritime lien springs into existence the moment the circumstances give birth to it, as damage, salvage, and wages. But it does not follow that, because a claim may by Act of Parliament be enforcible against the res, that therefore it is created a maritime lien."

The law had already been laid down to the same effect by the learned judge in the case of *The Pacific* (2), which related to the claim of a material man. He there pointed out that, in cases where statute gives to the creditor in an unsecured personal debt an action against the ship, and does not clearly prescribe that his claim shall override that of a mortgagee, such creditor in no case "obtains the ship as a security until he institutes his suit in this court." His right, in that case, is subject to any registered mortgage, and he must "arrest the ship, and thereby acquires the res as a security." So far I agree with the reasoning of the learned judge.

The real grounds of Dr. Lushington's decision in *The Mary Ann* (3) are to be found in the fact that, before the Act of 1861 his Court had a limited jurisdiction over claims for disbursements, and in the assumption that, in such cases, the master had a maritime lien. Upon these premises the learned judge argues, with considerable force, that it must have been the intention of the legislature that under the enlarged jurisdiction conferred by sect. 10 of the later Act the master's claim for disbursements should have the same privileges which were attached to it under the limited jurisdiction established by the Act of 1854. Referring to sect. 191 of the earlier statute, and the effect which he attributed to it as creating a lien, pro tanto, for disbursements, Dr. Lushington says (4): "If this be so, then under this Act (i.e. the Act of 1861) the master claiming for disbursements is to be preferred to the mortgagee, because, before the Act, his claim for his disbursements was entitled to a similar preference in the only case where the Court could take cognizance of such disbursements, namely, in the case of a set-off."

(1) Law Rep. 1 A. & E. 11.
(2) Br. & L. 243.
(3) Law Rep. 1 A. & E. 8.
(4) Law Rep. 1 A. & E. 12.

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In my opinion, the ratio of the judgment in *The Mary Ann* (1) fails; because, I am unable to hold that the enactments of sect. 191 of the Merchant Shipping Act can be interpreted as creating a maritime lien for disbursements; and the enactments of the statute of 1861, even when tested by Dr. Lushington's own principles, are in themselves insufficient to create such a right.

In *The Feronia* (2) the authority of *The Mary Ann* (1) was followed by Sir Robert Phillimore, who refers to and adopts the views of his predecessor. It was again followed in the case of *The Ringdove* (3) by Sir James Hannen, who stated that the reasoning of Dr. Lushington was not satisfactory to his mind. In the present case Butt J. considered himself bound by these precedents; but intimated that apart from their authority he would have had considerable difficulty in holding that there is any maritime lien for master's disbursements.

None of these judgments in the Admiralty Court were brought under review; but in *In re Rio Grande Do Sul Steamship Co.* (4), the Court of Appeal, in a liquidation, gave incidental effect to a lien for disbursements. An observation is attributed to James L.J. in that case which, if it had been made causâ cognitâ, would have been entitled to great weight; but the report shews that the lien was conceded, and that the point which your Lordships have now to decide was neither raised nor discussed.

It was strongly urged by the respondent's counsel that your Lordships are now precluded, by a series rerum judicatarum, from denying effect to the principle laid down in *The Mary Ann* (1) and *The Feronia* (2). But I do not think that these authorities, which have been followed but not approved in the most recent cases, are of sufficient weight to establish a latent security of an exceptional character against purchasers and mortgagees.

LORD MACNAGHTEN:—

My Lords, the main question argued in this case, and the only question upon which it is necessary to pronounce an opinion, is reduced to a narrow point.

It is clear that at the time of the passing of the Admiralty

(1) Law Rep. 1 A. & E. 8.
(2) Law Rep. 2 A. & E. 65.
(3) 11 P. D. 120.
(4) 5 Ch. D. 282.

Court Act 1861 disbursements made by the master of a ship in the ordinary course of his employment did not create any lien in his favour (1). It is equally clear that neither the Act of 1861, nor any subsequent Act, has in terms conferred a maritime lien for the master's disbursements. Sect. 10 of the Act of 1861 declares that "The Court of Admiralty shall have jurisdiction over . . . any claim by the master of any ship for disbursements made by him on account of the ship." That section gave the Court jurisdiction to entertain suits falling within its scope, and of itself it did nothing more. The jurisdiction, as the Act declared, might be exercised either by proceedings in rem or by proceedings in personam. It thus became competent for the Court of Admiralty, on the master preferring his claim for disbursements, to arrest the ship on account of which the disbursements were made. But in the absence of a maritime lien the arrest could not affect a subsisting mortgage or any other valid charge upon the ship.

So far the matter seems clear. And if the question depended solely upon the general law before the Act of 1861, and upon the language of that Act, there would be no ground for the contention put forward on behalf of the master in the present case. It cannot however be disputed, that ever since the year 1865 it has uniformly been held that the claim of a master for his disbursements is to be preferred to the claim of a mortgagee. Dr. Lushington arrived at that conclusion without any hesitation in the case of *The Mary Ann* (2). His view was adopted and approved by Sir R. Phillimore. It was accepted by the Court of Appeal in the case of *In re Rio Grande Do Sul Co.* (3), and it has been followed in *The Ringdove* (4) by Sir James Hannen, who observed that he did not feel at liberty to disregard the authority of *The Mary Ann* (2), though he could not say that Dr. Lushington's reasoning was altogether satisfactory to his mind.

The appellants challenge the decision in *The Mary Ann* (2), and the course of practice which has followed it. The respondent contends that the decision was right. But whether it was right or not, he says that it is too late now even for this House to

(1) See *Bristow* v. *Whitmore*, 9 H. L. C. 391.

(2) Law Rep. 1 A. & E. 8.

(3) 5 Ch. D. 282.

(4) 11 P. D. 120.

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interfere. I am sensible of the inconvenience of disturbing a course of practice which has continued unchallenged for such a length of time and which has been sanctioned by such high authority. But if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your Lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time. I propose, therefore, as briefly as I can, to examine the decision in *The Mary Ann* (1), and the circumstances under which it was pronounced.

Originally the master had no right to resort to the Court of Admiralty for his wages, or for anything due to him from the owners. The first alteration in this respect was made by the Merchant Seamen Act of 1844 (7 & 8 Vict. c. 112, s. 16), which gave the master, for the recovery of his wages, all the rights, liens and remedies of an ordinary seaman, but only in the case of the bankruptcy of the owner. As, however, an ordinary seaman had no right to come to the Admiralty Court when his wages were due under a special contract, this provision did not much improve the master's position.

Then came the Merchant Shipping Act 1854, which in sect. 191 re-enacted the provision in the Act of 1844 as regards the master's wages, omitting all reference to the bankruptcy of the owner, and then went on to enact that "if in any proceeding in any Court of Admiralty . . . touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into, and adjudicate upon, all questions, and to settle all accounts then arising, or outstanding and unsettled, between the parties to the proceeding, and to direct payment of any balance which is found to be due."

The first case of importance under this section was *The Caledonia* (2), decided in 1855. There the master preferred a claim for wages, and arrested the ship for a sum sufficient to cover his disbursements as well. The mortgagees intervened. They declared that they had no intention of setting up any right of

(1) Law Rep. 1 A. & E. 8. (2) Swa. 17.

set-off or counter-claim, but they tendered a sum less than the amount claimed in respect of wages, on the ground that payments had been made on account of wages both by themselves and by the owners. Dr. Lushington held that under the Act of 1854 if the owners chose to avail themselves "of any advances, or anything in the nature of a set-off," the whole account between the owner and the master was opened, and he thought that the mortgagees could be in no better position than the owners. There the general account between the master and the owners was not taken as against the mortgagees, apparently because they disclaimed any intention of setting up a right of set-off. But as the general account was not opened, they did not get the benefit of payments made by the owners on account of wages. They were only liable through the master's lien; but they had to pay more than the lien covered, though not more than what it might have covered if no payment had been made on account.

In the case of *The Glentanner*, which was decided in 1859 (1), the mortgagees were less discreet or less fortunate. They declared that they would set up a right of set-off or counter-claim. The master was then directed to bring in his accounts. The mortgagees did not file a counter-claim or set-off, but they objected to all the items in the master's account except those relating to the payment of wages. Dr. Lushington in giving judgment, stated that he adhered to every word he said in *The Caledonia* (2). He thought that the general account, if opened at all, must be gone through, and a balance made. He was of opinion that the accounts spoken of in the Merchant Shipping Act meant "the accounts between the master and the ship, exclusive of any private account between the master and her owners for merely extraneous purposes," and that a mortgagee taking possession of the ship and claiming the benefit of items in the account against the master's claim for wages, thereby made himself a party to the whole account. Why, he asked, should the master be prejudiced by the sale or mortgage of the ship? He was of opinion that as the mortgagees had declared to set up a counter-claim, and had opened the account, an item of £400 claimed for disbursements belonged to "the accounts arising or

(1) Swa. 415. (2) Swa. 17.

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outstanding and unsettled between them and the master, who were," he said, "the parties to the proceeding."

It is to be observed that the learned judge does not in terms say that the master had a maritime lien for his disbursements. His argument, if I understand his judgment aright, rather seems to be that a mortgagee intervening and setting up a right of set-off or counter-claim takes upon himself the personal liability of the owner for debts due in connection with the ship.

Then followed in order of date the Admiralty Jurisdiction Act 1861, which gives the Court of Admiralty jurisdiction over any claim by the master for wages, whether due under a special contract or not, and for disbursements made by him on account of the ship. Soon afterwards the question arose as to the effect of that Act on the master's claim for disbursements as between the master and a mortgagee. The point was raised directly in *The Mary Ann* (1), in which Dr. Lushington gave judgment on the 7th of November 1865. In that case, dealing with the language of the Act, the learned judge expressed the view which has since been established in the Privy Council and in this House. He thought that the words "the High Court of Admiralty shall have jurisdiction" meant "only what they purport to say—neither more nor less—that is, that the Court shall take judicial cognisance of the cases provided for." But he considered that in determining whether in these cases of extended jurisdiction it was meant to create a maritime lien, or what was the intention of the legislature, the Court would look to the law as it stood before the late Act. And he came to the conclusion that under the Act of 1861 the master claiming for disbursements was to be preferred to the mortgagee, "because before the Act his claim for his disbursements was entitled to a similar preference in the only case where the Court could take cognisance of such disbursements, namely in the case of a set-off."

I may observe that in that case also the learned judge, while holding that the claim of the master was to be preferred to that of the mortgagee, does not say in terms that the effect of the Act was to give the master a maritime lien for his disbursements. However, in *The Feronia* (1), which was decided in 1868, Sir

(1) Law Rep. 1 A. & E. 8. (2) Law Rep. 2 A. & E. 65.

Robert Phillimore expressly stated that in the case of *The Mary Ann* (1) it was decided that under the Act of 1861 "the master has a maritime lien both for his wages and disbursements, and that upon this ground his claim was preferable to that of a mortgagee." No doubt that was the practical result of the decision, and it has been so treated ever since.

Under these circumstances the question whether the decision in *The Mary Ann* (1), and the practice of the Admiralty Court, which rests upon it, can be supported, depends, I think, on the answer to be given to one or both of these further questions: (1) whether the decision in *The Glentanner* (2) was right? and if so, (2) whether the existence of the rule there laid down justified Dr. Lushington's inference as to the intention and effect of the Act of 1861. It is not, I think, necessary to go into the latter question, because I am of opinion that the decision of *The Glentanner* (2) was based on a construction of the Act of 1854 which is plainly erroneous.

Did the Act of 1854, as against a mortgagee or purchaser, give the master of a vessel a maritime lien for his disbursements in the event of his instituting a suit in the Admiralty Court for wages (which at that time he could only do in the absence of a special contract), and in the event of the mortgagee or purchaser thereupon setting up a right of set-off or counter-claim? The question, I think, answers itself. "A maritime lien," as was observed in *The Two Ellens* (3), "must be something which adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged. . . . It commences and there it continues binding on the ship until it comes to an end." A lien or preference, which is supposed to have its origin in a certain transaction, and yet has no binding force or effect unless and until two things happen, neither of which has any connection with the original transaction, is certainly not a maritime lien in the ordinary sense of the term. But, then, did Parliament intend to create this anomalous preference or privilege—whatever it may be called—in the particular case of the concurrence of the two events

(1) Law Rep. 1 A. & E. 8. (2) Swa. 417.
(3) Law Rep. 4 P. C., at p. 169.

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contemplated by sect. 191 of the Act of 1854? It would be strange if it did. The Act gave the master a maritime lien for wages; that is, I suppose, for the amount of his wages for the time being due and owing. Now, a man is bound to pay his own debts, and he is also bound to discharge a preferential claim on property upon which he has a security, if he means to make his security available. But even an honest man, without any disparagement to his honesty, may object to pay another man's debt, and may wish to investigate the amount of a preferential claim on property belonging to him as purchaser or mortgagee. Is it conceivable that it could have been the intention of Parliament that if the master brought a suit for wages for which the statute gave him a maritime lien, a mortgagee or purchaser intervening for the protection of his own property, should not be at liberty to investigate the extent of the lien—to see both sides of the special account with which alone he was concerned—except at the risk of having to pay a claim which up to that time was neither a debt of his nor a charge upon his property? I cannot imagine that even in hard cases—and these are all cases of hardship—Parliament meant to set a trap for unwary mortgagees. Is there anything in the language of the Act of 1854 to countenance such a notion? I do not think there is. The Act speaks of accounts "outstanding and unsettled between the parties to the proceeding." When a mortgagee intervened "the parties to the proceeding," as Dr. Lushington said in *The Glentanner* (1), were the master on the one hand and the mortgagee on the other; the master's claim for disbursements could not enter into the account between the mortgagee and the master. The claim for wages might properly come in because it was a preferential claim on property belonging to the mortgagee. If Parliament had intended by the Act of 1854 to give the master a maritime lien or a preferential claim for his disbursements, nothing would have been easier than to have said so. And it is to be observed that in the very section in question a lien is given in plain terms for the master's wages.

In the result, therefore, I am of opinion that the Act of 1854 did not in any event give the master a maritime lien or pre-

(1) Swa. 415.

ferential claim for his disbursements. It follows that in my judgment the decision in *The Glentanner* (1) proceeded on an erroneous construction of the Act, and that the decision in *The Mary Ann* (2), and the practice of the Admiralty Court, which rests upon it, cannot be supported.

Your Lordships, on the one hand, were warned of the disastrous consequences of disturbing the practice of the Admiralty Court. On the other hand, it was urged that the disadvantages resulting from allowing such a lien more than counterbalance any possible advantage, and it was said that the facilities of communication which exist nowadays between all parts of the world make it unnecessary to give the master a power which certainly may be abused. Between these conflicting views I do not venture to express any opinion. I have only to state what in my judgment the law really is. It is for the legislature to alter the law if Parliament in its wisdom thinks an alteration desirable.

I think the appeal ought to be allowed.

Order of the Court of Appeal and order of the Probate, Divorce and Admiralty Division reversed with costs here and below; cause remitted to the Probate, Divorce and Admiralty Division.

Lords' Journals 27th May 1889.

Solicitors for appellants: *Lowless & Co.*

Solicitors for respondent: *Ingledew, Ince, & Colt.*

(1) 1 Swa. 415. (2) Law Rep. 1 A. & E. 8.

[HOUSE OF LORDS.]

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THE NETHERSEAL COLLIERY COMPANY, LIMITED. . . . . APPELLANTS;

AND

BOURNE AND OTHERS . . . . . RESPONDENTS.

Mine—Wages—Payment by Weight of Mineral—Mineral contracted to be gotten—Coal Mines Regulation Act 1872 (35 & 36 *Vict. c.* 76) *s.* 17.

Persons were employed in a mine under a contract that coals should be paid for at 1s. 6*d.* per ton, and heading slack at 7*d.* per ton, no other slack to be paid for: all other slack to be deducted from the different places in proportion to their loading, and a premium of 2*d.* a ton on the coal to be paid to all those places whose boxes of coal did not contain an average of more than 112 lbs. of dust each per week.

The coal (including the slack gotten) was weighed close to the pit's mouth and was then sorted and carried forty yards and shot on to a screen, more slack being caused by the operations: a note of the slack which passed through the screen was taken by a person employed only by the mine-owners, and the weight of the slack was deducted from the weight at the pit's mouth. The wages of the miners were paid according to the weight of the coal after thus deducting the slack.

In an action by the miners to recover from their employers the difference between the wages so ascertained and the full wages if no such deduction had been made:—

Held, affirming the decision of the Court of Appeal (20 Q. B. D. 606), that the miners were entitled to recover:—

By Lord Halsbury L.C. and Lords Herschell and Macnaghten:—Because by the contract the amount of wages paid depended "on the amount of mineral gotten" within the meaning of sect. 17 of the Coal Mines Regulation Act 1872 (35 & 36 Vict. c. 76), but the miners were not paid "according to the weight of the mineral gotten," nor was "such mineral truly weighed accordingly," within the meaning of that section; for "the mineral contracted to be gotten" was coal including slack, and slack was not "material other than mineral contracted to be gotten," and was therefore not one of the deductions allowed by that section:

By Lords Bramwell and FitzGerald:—Because though the deductions were not in contravention of sect. 17, the weights were not ascertained in the manner required by sect. 18.

APPEAL from a decision of the Court of Appeal (1).

The respondents sued the appellants in the Leicestershire

(1) 20 Q. B. D. 606.

County Court held at Ashby-de-la-Zouch to recover about £20 for wages: they also claimed the amount as having been illegally and improperly deducted from their wages without the assent of the check-weigher at the colliery and against the provisions of the Coal Mines Regulation Act 1872 (1).

(1) The Coal Mines Regulation Act 1872 (35 & 36 Vict. c. 76) s. 17: "Where the amount of wages paid to any of the persons employed in a mine to which this Act applies depends on the amount of mineral gotten by them, such persons shall, after the first day of August one thousand eight hundred and seventy-three, unless the mine is exempted by a Secretary of State, be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly.

"Provided always, that nothing herein contained shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in such mine that deductions shall be made in respect of stones or materials other than mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer or by the person immediately employed by him, such deductions being determined by the banksman or weigher and check-weigher (if there be one), or in case of difference by a third party to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other.

"Where it is proved to the satisfaction of a Secretary of State that by reason of any exigencies existing in the case of any mine or class of mines to which the foregoing provision in this section applies, it is requisite or expedient that the persons employed in such mine or class of mines should not be paid by the weight of the mineral gotten by them, or that the beginning of such payment by weight should be postponed, such Secretary of State may, if he think fit, by order exempt such mine or class of mines from the provisions of this section, either without condition or during the time and upon the conditions specified in the order, or postpone in such mine or class of mines the beginning of such payment by weight, and may from time to time revoke or alter any such order.

"If any person contravenes or fails to comply with, or permits any person to contravene or fail to comply with, this section he shall be guilty of an offence against this Act; and in the event of any contravention of or non-compliance with this section by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he prove that he had taken all reasonable means by publishing and to the best of his power enforcing the provisions of this section to prevent such contravention and non-compliance."

Sect. 18: "The persons who are employed in a mine to which this Act applies, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as 'a check-weigher') at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by

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The facts proved at the hearing before the county court judge are set out in the report 20 Q. B. D. 606. For the present purpose the following outline will suffice.

The plaintiffs were miners employed by the appellants originally under an agreement containing the following clause: "that 'the mineral contracted to be gotten' referred to in the Coal Mines Regulation Act 1872 shall in all cases mean and include only such pieces of clean coal as cannot be fairly passed through an ordinary loading rake the clear spaces between the prongs of which are two and a half inches wide."

Afterwards an agreement containing the following clause was entered into:

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whom he is so stationed. The check-weigher shall be one of the persons employed either in the mine at which he is so stationed or in another mine belonging to the owner of that mine. He shall have every facility afforded to him to take a correct account of the weighing for the persons by whom he is so stationed; and if in any mine proper facilities are not afforded to the check-weigher as required by this section, the owner, agent, and manager of such mine shall each be guilty of an offence against this Act, unless he prove that he had taken all reasonable means by enforcing to the best of his power the provisions of this section to prevent such contravention or non-compliance.

"The check-weigher shall not be authorized in any way to impede or interrupt the working of the mine, or to interfere with the weighing, but shall be authorized only to take such account as aforesaid, and the absence of the check-weigher shall not be a reason for interrupting or delaying such weighing.

"If the owner, agent, or manager of the mine desires the removal of a check-weigher on the ground that such check-weigher has impeded or interrupted the working of the mine or interfered with the weighing, or has otherwise misconducted himself, he may complain to any Court of summary jurisdiction, who, if of opinion that the owner, agent, or manager shews sufficient primâ facie ground for the removal of such check-weigher, shall call upon the check-weigher to shew cause against his removal. On the hearing of the case the Court shall hear the parties, and, if they think that at the hearing sufficient ground is shewn by the owner, agent, or manager to justify the removal of the check-weigher, shall make a summary order for his removal, and the check-weigher shall thereupon be removed, but without prejudice to the stationing of another check-weigher in his place.

"The Court may in every case make such order as to the costs of the proceedings as they think just.

"If in pursuance of any order of exemption made by a Secretary of State, the persons employed in a mine to which this Act applies are paid by the measure or gauge of the material gotten by them, the provisions of this section shall apply in like manner as if the term 'weighing' included measuring and gauging, and the terms relating to weighing shall be construed accordingly."

"It is agreed to-day that coals sent from the stalls and headings shall be paid for at 1*s.* 6*d.* per ton and heading slack at 7*d.* per ton, all other prices as at present paid to remain in operation. A premium of 2*d.* per ton on the coal will be paid to all those places whose boxes of coal do not contain an average of more than 112 lbs. of dust each per week. No slack whatever will be paid for except that sent out as heading slack. All other slack will be deducted from the different places in proportion to their loading."

The mode of weighing was as follows:—The coal having been put into tubs in the pit, the tubs were hoisted to the pit's mouth, unhooked and wheeled to a weighing machine where the coal was weighed and the weights taken and checked by the weigher and check-weigher. Some slack was carried in the transit to the pit's mouth. The coal was then moved in trucks to a place where it was sorted into classes, the larger lumps being broken by picks or crowbars, which creates some slack. After this assorting the trucks were taken forty yards from the weighing machine and the coal was shot down on to a screen called "Billy Fairplay," and a boy (employed only by the appellant company) noted from a dial the weight of the slack that had gone through the screen. The bars of Billy Fairplay were seven-eighths of an inch apart. The amount of slack noted by the boy was deducted from the weights taken by the weigher and check-weigher at the pit's mouth. Two per cent. of slack was caused by the operations before Billy Fairplay was reached.

The amount claimed was for the difference for about six months between the wages so ascertained and the full wages if no such deductions had been made.

The county court judge gave judgment for the defendants. The Divisional Court (Stephen and Wills JJ.) reversed this decision and entered judgment for the plaintiffs for the amount claimed (1). The Court of Appeal (Lord Esher M.R. and Lopes L.J., Fry L.J. dissenting) affirmed the decision of the Queens' Bench Division (2).

The defendants brought the present appeal.

(1) 19 Q. B. D. 357. (2) 20 Q. B. D. 606.

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May 10. *Rigby* Q.C. (*Blennerhassett* with him) for the appellants:—

The question turns upon sect. 17 of the Coal Mines Regulation Act 1872. The appellants' contention is twofold. First, the case is not within that section, because under the contract in this case the amount of wages does not depend upon "the mineral gotten" within the meaning of that section. The section is only applicable where the wages depend on *all* the mineral gotten. Here the total amount of mineral gotten consists of parts, some of which have to be paid for, viz., the coal and the heading slack, and some have not to be paid for, viz., the slack. Moreover, part of the payment was by way of premium. The wages do not depend on the amount of mineral gotten in any other sense than this, that the more coal the miner gets the more wages he receives, but he receives nothing for slack. It is not denied that every handling of coal makes some slack, but upon the evidence that is only two per cent. and de minimis non curat lex. The slack though actually gotten was not contracted to be gotten. The measure of wages therefore is not the mineral gotten. Sect. 17 is directed against difficulties which arose in measuring and was not intended to interfere with freedom of contract.

Secondly, if the case be within the section there is no enactment that everything gotten shall be paid for. If the section applies the proviso allows a deduction in respect of stones and other materials, and that would include slack. Moreover, the proviso is for the benefit of the miners; of men who may insist on their rights. By sect. 18 the men have the power to appoint their own check-weigher, but they are not bound to do so; they may if they please renounce a provision which is for their benefit, and they did so here.

A. K. Loyd (*Alfred Young* with him) for the respondents:—

First. The contract in this case is within sect. 17 of the Act. Besides the categories wages dependent on the amount of mineral gotten and wages dependent on time, Fry L.J. held there was a third or intermediate category, viz., wages dependent on the amount of a portion of the mineral gotten. It is submitted that for the purpose of sect. 17 no such category is admissible. The

wages are not the less "dependent on the amount of mineral gotten" because a deduction is contracted for in respect of part of such mineral. Otherwise any deduction under the proviso would defeat and annul the effect of the section: See *Hynd* v. *Spowart* (1).

Secondly. Wages being therefore dependent on the amount of mineral gotten within sect. 17 they are to be paid according to the weight of the mineral gotten. The mineral is gotten when it is put into the tub, and that is the mineral to be weighed and paid for; subject to two sorts of deductions which must be (*a*) agreed for between the mine-owner and the miner, (*b*) determined in a particular manner. The only allowable deductions are (1) for stones or materials other than mineral contracted to be gotten, and (2) for tubs, etc., being *improperly filled* by the miner or his loader. The "mineral contracted to be gotten" within the meaning of the first deduction means nothing more than the mineral which gives its name to the mine or the getting of which is the object of working the mine. The expression is used to exclude stones and foreign substances other than (in this case) coal. Slack is coal, and any stipulation that it shall not be deemed to be coal would be void under this section. The next deduction would, however, apply to slack *if improperly loaded into the tubs* instead of being left on the floor of the mine. This deduction is introduced expressly to cover the case of slack, which but for the impropriety of putting it into the tub would, as part of the mineral contracted to be gotten and therefore not within the first deduction, escape the proviso altogether. But here no attempt is made to challenge the slack as improperly filled into the tubs. The appellants, instead of so objecting to it and having the deduction determined by the banksman for the company and the check-weigher for the men, or in case of difference by their umpire, have founded a subtle argument upon the words "mineral contracted to be gotten" in the first deduction. They thus claim to deduct for all slack whether made by the miners or by themselves.

Thirdly. Any deduction can only be made in strict accordance with the requirements of the Act. The Act is intended to restrict

(1) 22 Scottish L R. 702.

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freedom of contract, as is shewn by sects. 4 to 16 inclusive, which regulate (under penalties) various matters usually left to the discretion of the parties. The object of sects. 17 and 18 was to provide for a simple and clear method of determining the amount of wages earned by the miners. There is to be a check-weigher (if the men choose) to be paid by them and to be stationed at *the place* appointed for *the weighing* and he is to have every facility afforded him (under penalties) for taking a correct account of the weighing. The weight that he is to take is the weight on which the wages are to be paid, not a mere gross weight from which after subjecting the coal to various processes over which the miners have no control the company are to make a deduction. The weighing at "Billy Fairplay" was not at the pit's mouth or in the presence of the check-weigher but was forty yards off.

Rigby Q.C. in reply.

THE HOUSE took time for consideration.

June 3. LORD HALSBURY L.C.:—

My Lords, this case seems to me to resolve itself into the comparatively narrow question of what is the true construction of the statute.

Now, the statute itself discloses the view that the mine-owner and the persons employed in the mine were not in the contemplation of the legislature fit to be trusted to make their own bargains; and the object and intention of the 17th section, upon which this question turns, is obviously, in cases where the wages depend upon the weight of the mineral won, to create a statutable duty to weigh and to pay according to the weight so ascertained.

It is obvious further that the draftsman or some person familiar with mining feared whether in creating that duty and imposing the obligation to pay according to the weight so ascertained—knowing that such weight would have to be ascertained according to the practical usage of miners—feared, I say, that if the earlier part of the section remained unqualified the mine-owner would be obliged to pay by weight, when so ascer-

tained, whatever might be contained in the tubs, baskets or hutches, and accordingly the latter part of the section was introduced to save the right of contracting that stone or materials other than the mineral contracted to be gotten should be deducted from the weight, but this reserved right of contract was only capable of being put in force by the mode pointed out in the section.

Now the contract in the case before your Lordships appears to me to be open to the very plain objection that the contract being a contract in relation to the mineral contracted to be gotten, namely, coal, and the wages depending on the amount of mineral gotten, as I cannot doubt that they do, it makes the test not the weight to be paid for according to the weight ascertained, but provides that from that weight shall be deducted slack or small coal.

Now it is clear that this would offend against the first part of sect. 17, and if lawful at all it must be within the only deduction authorized by the statute. But is it so included? I think it clearly is not, and I think slack is certainly the mineral contracted to be gotten.

The phrases which are conveniently used in a miner's vocabulary as representing different classes of coal do not the less make the things designated different in their own nature. Coal is coal, and small coal is called slack, but the miner's labour is equally engaged in getting it. It is brought from the mine as big lumps of coal and is afterwards reduced in size, sometimes by intentional sometimes by accidental and unavoidable breakage. But the statute, evidently drawn under the instructions of some one familiar with the practical operations of a coal mine, has provided that where deductions are to be allowed a particular course is to be followed, and the men employed are to have a right to have some one appointed and paid by themselves to check the weight by which their wages are to be regulated.

The scheme therefore of the Act seems to be plain. In cases to which the statute applies the payment must be according to the weight gotten. From that weight gotten only certain things can be deducted and the deductions can only be ascertained in a particular way. I think slack is not one of the things that can

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be deducted, and no such deduction as is here contended for was ascertained in the manner prescribed by the statute.

It follows, I think, that as the whole contract is not illegal but the deductions are not enforceable, the plaintiffs had a right to sue for the wages due to them without any such deduction. The judgment therefore of the Court of Appeal, is right and this appeal should be dismissed with costs, and I so move your Lordships.

LORD BRAMWELL:—

My Lords, in this case the respondents say that they have got certain weights of mineral, within the 17th section of 35 & 36 Vict. c. 76, and that instead of being paid according to the weight of such minerals, deductions have been made, which should not have been made at all, or which should not have been made as the amounts of the deduction were not ascertained as prescribed by the statute; so they say they have not been paid according to the weight of the mineral gotten.

The first answer of the appellants is that the case is not within the statute, that the men were not to be paid by weight, because in addition to payment for weight they were to have a premium in certain cases, and because as to part of the mineral, viz., the slack, they were not to be paid at all. I cannot agree to this. I think the substance and intention of the enactment must be looked at. Substantially the miners were to be paid by weight, and I think that provision is made, though awkwardly, for ascertaining and deducting whatever was to be deducted.

A difficulty occurred to me of this sort: that the section only provided for ascertaining the weight for which payment was to be made, and did not forbid the men agreeing not to be paid for slack; that the contention of the respondents involved this—that it was unreasonable and could be evaded by agreeing for a farthing a ton for slack. But I think there is an answer to this. If the first clause of sect. 17 stood alone the coal to be paid for must be weighed; the coal not to be paid for, i.e., slack, need not be weighed except to see what was the weight of that to be paid for.

But there is the second clause of sect. 17. I dislike finding

fault with statutes; there is nothing so difficult to draft. But it is necessary to examine the clause in question. It says that nothing herein contained shall preclude the owner of the mine from agreeing with the persons employed in such mine that deductions shall be made in respect of stones or materials other than mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of tubs improperly filled, &c. If the clause stopped there it would be idle and nugatory, because nothing in the prior part of the section would preclude such an agreement. Not only might such an agreement be made, but even without such an agreement there would be a right to make such deduction. For by the first clause the men are to be paid only for the "mineral gotten," which by itself would mean the mineral gotten and to be paid for, and if slack was not to be paid for it might be deducted. Nor do I value the words "other than mineral contracted to be gotten." To my mind, the slack is no part of the material contracted to be gotten. Possibly that which is caused by attrition and otherwise in the passage from the mine to the bank is, but that is trifling in amount. The slack caused by excavation is not; it is worthless and a loss to the mine worker if he has to pay a royalty on it. But there is the latter part of the second clause of sect. 17, "such deductions being determined by the banksman or weigher," &c.

Now it seems to me that to make sense of this, we must hold it to mean that the deductions which could be agreed to within the prior part of the clause, whether by virtue of it or otherwise, must be determined as in the clause mentioned, or not be allowed. For instance, if a tub full or half full of stones is sent up, or a tub improperly filled, whatever that may mean, the deduction is to be determined by the banksman or weigher and check-weigher, as mentioned in the clause, or not allowed.

The effect of the enactment, then, is, that the men must be paid by weight, that that weight is to be the weight of all they send up, but that from it may be deducted the weight of certain matters, provided that weight is ascertained in a certain way. Here the weights were not ascertained in that way. The deductions therefore could not be made. Mr. Rigby said that the men could

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waive the stipulation on the general principle Quilibet renunciare potest juri pro se introducto. I think not; the last clause of sect. 17 makes it illegal to do so.

In the result, then, I think our judgment must be for the respondents. I regret it, because I think they have continued to act on the understanding that what was done was in substance right, and that they succeed on a point beside the merits. It is true they complained from time to time, and they did lose a trifle by the carriage of the coal to "Billy Fairplay," and otherwise, but a trifle only. However, it is the fashion to tempt people into making such claims, which, to my mind, are barely honest. It has been done in this case, and our judgment must be accordingly.

LORD FITZGERALD:—

My Lords, I have had special difficulties in reaching a conclusion satisfactory to myself on this appeal, arising in some degree from inacquaintance with colliery operations. In such a case, which is said to affect very large and important interests, it was very desirable that the contract should have been ascertained with accuracy and the facts laid fully and clearly before your Lordships. That has not been done, your Lordships have to make them out as best you can.

There is one matter that stands prominently out, viz. that the colliery company seem all throughout to have had one special object—to prevent mere slack from being unnecessarily sent to the surface. Mere slack, it is agreed, was practically worthless, and when brought up was a trouble and an expense, subject to royalty if any such charge was payable; and its removal from below may have been injurious to the mine.

This colliery appears to have been managed below by stallmen who worked out the coal, and by loaders who put it into the tubs, each having an interest to get into each "tub" as much mere slack as practicable. The loaders were supplied with loading rakes and forks by the company, but not with shovels.

Now as to the contract. The document styled "the original agreement," a printed document, seems to me to have continued to form part of the contract, and as such was put before the

county court judge, as we find in his judgment in the following passage: "The judgment of Stephen, J., in *Jones* v. *Llynvi and Tondu Colliery Company* (not reported), relieves me from the duty of inquiring whether it is competent for miners to contract for the supply of coal of a given measurement so that the mineral contracted to be gotten shall include only such pieces of clean coal as cannot fairly be passed through an ordinary loading rake with prongs 2½ inches apart; and as the bars of 'Billy Fairplay' are less than an inch apart, the miners get the benefit of all pieces of coal between one inch and two and half inches thick."

The document of the 11th of May 1886 does not appear to have been acted on and was probably superseded by the agreement of the 17th of May 1886 which contains the important provision "all slack sent in coal to be taken off to extent registered by 'Billy Fairplay'."

The agreement of July 1886 which varies but does not annul the preceding agreements, is the last, and is in these words:—

"Netherseal Colliery,
"July 3/86.

"It is agreed to-day that coals sent from the stalls and headings shall be paid for at 1*s.* 6*d.* per ton, and heading slack at 7*d.* per ton; all other prices as at present paid to remain in operation. A premium of 2*d.* per ton on the coal will be paid to all those places whose boxes of coal do not contain an average of more than 112 lbs. of dust each per week. No slack whatever will be paid for except that sent out as heading slack. All other slack will be deducted from the different places in proportion to their loading. This agreement in operation on and after Wednesday last 30th day of June, and to terminate after fourteen days' notice on either side to expire on any Saturday."

The terms of the contract to be deduced from these documents are very clearly expressed, and are these: 1. The mineral "contracted to be gotten" referred to in the Coal Mines Regulation Act 1872 shall in all cases mean and include only such pieces of clean coal as cannot be fairly passed through an ordinary loading rake the clear spaces between the prongs of which are 2½ inches wide. 2. Coals (that is such coal) to be paid for at 1*s.* 6*d.* per ton. 3. Heading slack at 7*d.* per ton. 4. All other

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slack to be deducted and taken off to the extent registered by "Billy Fairplay."

It will be observed that there is nothing to interfere with the right of the miners to be paid for the coal "contracted to be gotten" by weight. The agreement seems to have been clear in its terms and fair in all its parts.

I do not doubt that the contract in question should be dealt with as coming within and not forbidden by the first provision of the 17th section of the statute. The statute does not prevent freedom of contract, and I find nothing to hinder the parties from mutually agreeing that the coal to be gotten by the miners and brought to the surface, and on the weight of which their wages are to be estimated, shall consist of coal as described in the contract, which would represent coal merchantable for some purpose and of some value, and not valueless and unsaleable slack. The exception in favour of "heading slack" was satisfactorily explained to your Lordships and no question now arises on it.

It seems to me also that it was competent to the parties to agree that the separation of the slack in each tub from the contract coal should be accomplished by the screen at "Billy Fairplay," and its weight ascertained by the automatic operation of that machine. Nothing could be fairer, and mistake was not to be anticipated if the boy employed there correctly recorded the results.

The plaintiffs, however, rely on the second provision of sect. 17. They contend that anyhow the amount of slack separated from the coal at "Billy Fairplay," was a deduction within the meaning of sect. 17, and that its amount was not determined by the weigher and check-weigher in the manner prescribed by that section.

The plan pursued by the company and, as it seems, with the concurrence of the miners, was just and convenient, but it was not in accordance with the statute.

In my opinion "slack" was either a material other than the mineral contracted to be gotten or constituted an improper filling of a tub in respect of which it was lawful to stipulate for a deduction from the gross weight, and if the amount to be so deducted had been determined by the weigher and check-weigher

I should have come to the conclusion that the action of the plaintiffs failed.

Unfortunately the terms of the statute were not followed, and I have been obliged to come to the conclusion that the deductions for "slack" not having been ascertained in the statutable manner cannot be allowed. I have reached this conclusion with regret, for I cannot shut out the injustices which follow. It was much pressed on your Lordships in the argument that some of the "slack" was created by attrition in the course of transit, but this was not put higher than 1 to 2 per cent., whereas the weight of slack ascertained at "Billy Fairplay," and sought to be deducted, was on an average 10 per cent., and in some instances it was as high as 20 per cent.

LORD HERSCHELL:—

My Lords, the notes of the learned county court judge leave in some obscurity what was the exact contract between the respondents and their employers. It is not clear whether the original agreement between the parties, "that the mineral contracted to be gotten, referred to in the Coal Mines Regulation Act 1872, should in all cases mean and include only such pieces of clean coal as cannot be fairly passed through an ordinary loading rake, the clear spaces between the prongs of which are 2½ inches wide," was incorporated, either in its terms or with modifications, into the agreement in force between the parties at the time with which your Lordships have to deal. But I think it immaterial whether this was so or not. It is clear that the respondents had agreed that whilst 1*s.* 6*d.* a ton was to be paid for coal 7*d.* only was to be paid for heading slack, and that except this no slack was to be paid for. All other slack was to be deducted from the different "places" in proportion to their loading, and 2*d.* a ton on the coal was to be paid to all those "places" whose boxes did not contain an average of more than 112 lbs. of dust each per week.

Some slack, that is to say, small coal, or coal dust, is necessarily produced in getting the larger pieces, and some in the process of loading the coal into tubs and in conveying the tubs to the surface. The tubs are weighed close to the place where they

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are unhooked, and the weights taken and checked by the weigher and check-weigher. The coal is afterwards assorted into classes. For this purpose the larger lumps are broken by picks or crowbars, which creates some slack. After this assorting, the trucks containing the coal are taken a distance of forty yards from the point where the weighing takes place, and shot down six feet on to a screen called "Billy Fairplay." That again creates more slack. A note of the weight of slack that has passed through the screen is taken by a boy, and this is deducted from the weights ascertained by the weigher and check-weigher at the pit's mouth. The wages are paid according to the weight of the coal after making this deduction.

The question your Lordships have to consider is whether the deduction in respect of this slack could properly be made, or, in other words, whether the agreement can in that respect be enforced against the respondents by their employers. This depends upon the construction to be put upon sect. 17 of the Coal Mines Regulation Act 1872.

It is contended, in the first place, that the section is inapplicable in the case of an agreement such as existed in the present case. The section prescribes how the wages are to be ascertained where the amount of wages paid "depends on the amount of mineral gotten." Here, it is said, the wages did not depend on the amount of mineral gotten, but on the amount of a part only of the mineral gotten, that is to say, the coal other than slack. I am unable to concur in this construction of the statute. It seems to me that if your Lordships were to sustain it, the provisions of the statute would be rendered nugatory. It would be sufficient to agree that any portion of the mineral gotten should not be paid for, in order to oust the operation of the clause altogether. When I consider the terms of the proviso contained in the section, with its careful provision as to the deductions which may be agreed upon, and the manner in which those deductions are to be ascertained, and when I see how limited a power is conferred upon the Secretary of State of authorizing payment otherwise than by weight, I cannot think that it would be giving affect to the manifest intention of the legislature if your Lordships were to hold that any deduction agreed upon operated as

effectually to exempt the employers and employed from the operation of this part of the statute as if the Secretary of State had made an order under it.

This view is confirmed by an examination of the provisions of the following section. It empowers the persons employed in a mine, who "are paid according to the weight of the mineral gotten by them," to appoint a check-weigher. If the construction which Lord Justice Fry has put upon the 17th section be correct, it would seem to me equally clear that the 18th section does not apply to the present case, and that though the men were certainly to be paid by weight, yet inasmuch as it was not according to the weight of the mineral gotten, they would have no right to appoint a check-weigher. There seem to me, therefore, to be strong reasons why your Lordships should not, unless compelled, come to the conclusion that the present case is not within the section. And, for my part, I feel no difficulty in saying that the amount of wages paid did depend on the amount of mineral gotten. Can it be said that the amount of wages was independent of it, when the larger the quantity of mineral gotten the higher would be the wages, and the smaller the quantity the less the wages?

But then it was said that the mineral contracted to be gotten in the present case was coal other than slack, except heading slack, and that there was nothing in the enactment to prevent an agreement that deduction should be made in respect of the slack, inasmuch as it was a material other than that contracted to be gotten.

In dealing with this point we must, I think, in order to understand the intention of the legislature, consider the opening words of sect. 17 and the proviso which follows together. The section provides that where the amount of the wages of the persons employed depends on the amount of mineral gotten by them, "such persons shall be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly." I think this is something more than an enactment that in the cases referred to the wages shall be paid according to weight, and not according to measure, or any other mode of ascertainment. It is a provision that the payment

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shall be according to the weight "of the mineral gotten," and "such" mineral is to be truly weighed. If confirmation of this were needed it is to be found in the proviso, "that nothing herein contained" shall preclude an agreement between employer and employed that deductions shall be made in respect of stones or materials, "other than mineral contracted to be gotten," which shall be sent out of the mine with the mineral contracted to be gotten. This shews that an agreement to make a deduction in respect of a portion of the mineral to be gotten, or, in other words (for I lay no particular stress on the word "deduction"), to pay according to something less than the weight of the mineral gotten, was not to be permitted, or at least, not to be given effect to.

The view which I take of sect. 17 is borne out by the provisions of sect. 18 to which I have already drawn attention. The scheme of that section obviously is that in all cases where the employed are paid by weight or measure they shall be empowered to appoint a person on their behalf to check such weight or measure. This is shewn by the provision contained in the last paragraph of the section, which enacts that where by an order of exemption the Secretary of State has allowed the persons employed to be paid by measure or gauge, all the provisions relating to "weighing" are to be applied to measuring. It will be observed, as I have pointed out already, that the section only applies to persons paid "according to the weight of the mineral gotten by them." They may appoint a check-weigher at the place appointed for the weighing of "such" mineral, in order to take an account of the weight "thereof." I think this shews that the legislature had intended by the previous section that in all cases where weight was to be the test of payment, the weight taken should be that of the whole of the mineral gotten.

Now, applying these views to the facts of the present case, what was the mineral "contracted to be gotten?" I think the answer must be "coal;" not large pieces of coal only, but all the coal, whether large or small, which necessarily arose from the operation of getting the produce of the mine. The whole of that substance which unavoidably, or in the ordinary course of working, found its way into the tubs, and so to the pit's bank,

was, in my opinion, mineral contracted to be gotten. Certainly, it is difficult to see how the slack caused by putting the coal into the tubs, or in their transit to the pit's mouth, or by the breaking of the large pieces of coal, or by shooting it on to "Billy Fairplay," which, beyond question, was part of the mineral contracted to be gotten when it formed part of the large pieces of coal, ceased to be mineral contracted to be gotten because it was afterwards crushed or shaken into smaller pieces.

It was said that the construction which has been put upon the statute by the Court below would be unreasonable in its effects, inasmuch as it would afford an inducement to the persons employed to put more slack into the tubs than would find its way there inevitably, or according to the ordinary course of working. But I am disposed to think, though it is not necessary to express any positive opinion upon it on the present occasion, that this would be an improper filling of the tubs, and deductions in respect of such improper filling may lawfully be agreed upon.

I have only to add that I think the intention of the legislature was, that the deductions validly agreed upon should be ascertained by the weigher of the mineral gotten in the presence of the check-weigher, where one has been appointed. I therefore concur with the observations made upon this point by the learned judges in the Courts below.

Upon the whole, I have arrived, without hesitation, at the conclusion that the order of the Court below ought to be affirmed.

LORD MACNAGHTEN :—

My Lords, I do not think that this case presents any real difficulty though the parties have been at some pains to disguise their meaning.

It was common ground that the Coal Mines Regulation Act 1872 applied to the Netherseal colliery. I cannot doubt that the miners employed there were employed to get coal, and that in their case coal was the "mineral contracted to be gotten" within the meaning of that expression as used in sect. 17 of the Act. Nor can I doubt that coal is coal whether it be "round coal or slack." It is one and the same mineral, whether it is in large blocks or minute fragments, whether the pieces will or will not

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pass through an ordinary loading rake with prongs 2½ inches apart.

It is, I think, equally clear that the amount of the wages of the persons employed there in actually getting coal depended upon the amount of coal gotten by them. In practice probably the amount of the wages of miners always depends on the amount of mineral gotten by them. They are never, I should suppose, paid by time.

Now the Act of 1872 as applied to this case is tolerably plain. In such a case as this the Act says that the persons employed shall "be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly." Two deductions and two only are allowed. By agreement between the masters and the men deductions may be made (1) "in respect of stones" or foreign substances "sent out of the mine with the mineral contracted to be gotten," and (2) in respect of any tubs, baskets, or hutches being improperly filled by the getter of the mineral or his attendant. It was said by the learned counsel for the respondents, and not I think disputed on behalf of the appellants, that the second head of deduction would meet the case of an undue proportion of slack being sent to bank. Whether that is so or not one thing is clear that no deduction is permissible except what the Act specifies and allows.

That being the law, if the agreement had stated in plain terms that a deduction was to be made from the wages of the miners in respect of slack—whatever form the deduction might have taken, whether the slack was to be absolutely rejected or paid for at a lower rate—no one I think could have doubted that that part of the agreement would have been in contravention of the Act of Parliament.

In my view of the case the parties have in effect said the same thing in roundabout language. They have said that "the mineral contracted to be gotten referred to in the Coal Mines Regulation Act 1872 shall in all cases mean and include only such pieces of clean coal as cannot be fairly passed through an ordinary loading rake, the clear spaces between the prongs of which are 2½ inches wide." They might I think as well have said that the stones referred to in the Act should mean and include

slack, or that tubs, baskets, or hutches should be deemed to be improperly filled when any slack at all was brought to bank in them.

In the case of persons employed in mines the legislature has thought good to impose a fetter on freedom of contract between masters and men. Parliament would legislate to little purpose if the objects of its care might supplement or undo the work of legislation by making a definition clause of their own. People cannot escape from the obligation of a statute by putting a private interpretation upon its language.

I do not impute to the managers of the colliery that they have acted or meant to act unfairly or oppressively towards their men. On the contrary I am by no means sure that in this case the men are not taking advantage of the provisions of the Act to escape from a bargain which they entered into or confirmed with their eyes open, which was fair in itself, and of which they have taken all the benefit. But in my opinion the provision to which the respondents take exception is prohibited by the Act of Parliament, and therefore no legal effect can be given to it.

I am therefore of opinion that the appeal must be dismissed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 3rd June 1889.

Solicitors for appellants: *Morten, Cutler & Co., for Challinor & Co., Leek.*

Solicitors for respondents: *Field, Roscoe & Co., for Deane & Hands, Loughborough.*

[HOUSE OF LORDS.]

H. L. (E.)
1889
June 4.

ANDREW KNOWLES & SONS LIMITED AND OTHERS . . . . . APPELLANTS;

AND

THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY . . . . . RESPONDENTS.

Canal Company—Right to Support—Mines under or near Canal—Compensation for not working Mines—Right of Action for Injury to Canal.

By a section of an Act empowering a company to make a canal it was provided that nothing therein contained should affect the right of any owners of lands to the mines and minerals under the lands to be made use of for the canal, and that it should be lawful for such owners to work such mines and minerals, not thereby injuring, prejudicing or obstructing the canal. By another section it was provided that if the owners should in pursuing such mines work near or under the canal so as in the opinion of the canal company to endanger or damage the same, or in the opinion of the owners of the mines to endanger or damage the further working thereof, it should be lawful for the canal company to treat and agree with the owners for all such minerals as might be near or under the canal as should be thought proper to be left for the security of the canal or mines; and in case they should disagree then it should be lawful for certain commissioners at the request of the canal company or of such owners to summon a jury to assess what satisfaction such owners ought to receive from the canal company: and upon payment of such satisfaction such owners should be perpetually restrained from working such mines within the limits for which satisfaction should by the jury be declared to extend.

Owners of a coal mine under and near the canal having given the canal company notice that they were going to work the coal, the company declined to purchase or pay compensation for leaving the coal, and the owners then worked the coal and thereby damaged the canal. The working was in the usual mode, without negligence and without doing unnecessary damage save in not leaving sufficient support:—

Held, affirming the decision of the Court of Appeal (20 Q. B. D. 391), that the owners of the mine had a right under the Act to initiate proceedings and to receive satisfaction for such minerals as should be thought proper to be left for the security of the canal or the mine, but were liable in damages for working the mine to the injury of the canal.

Dudley Canal Co. v. *Grazebrook* (1 B. & Ad. 59) distinguished.

Cromford Canal Co. v. *Cutts* (5 Railw. Cas. 442) approved.

APPEAL by the defendants from a decision of the Court of Appeal (1).

(1) 20 Q. B. D. 391.

The question turned entirely on the words of a special Act of Parliament, the material sections of which with the facts are set out in the report below (1). They are also summarized in the judgments in this House.

March 7, 8. Sir *R. E. Webster* A.G. and Sir *Horace Davey* Q.C. (*R. Henn Collins* Q.C. and *John Dixon* with them) for the appellants:—

The case turns on the construction of sects. 37, 38 and 39 of 31 Geo. 3 c. lxviii. Those sections should be read together as forming one code. The respondents read sect. 37 as if it stood by itself. The words in sect. 37 "subject to the conditions and restrictions herein contained" mean subject to sects. 38 and 39. The theory of sect. 38 is that the mine-owners are to look after their own interests and the canal company after theirs. This Act does not contain the elaborate machinery as to notice contained in the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) ss. 77, 78, 79, but that is the only distinction: the principle is the same. The canal company can take the initiative and "treat and agree with" the mine-owners when the workings threaten the safety of the canal, but not when the working of the mine is endangered. And so with the mine-owners: each party can move to protect its own interests, but not otherwise. A leakage which might drown the mine might not seriously injure the canal. The canal company have the option of buying the support or running the risk of damage, and if they elect not to buy they must run the risk. If the canal company refuse to avail themselves of the machinery provided in sect. 38 and the mine-owners work without negligence and in the ordinary way it will be a strange construction if they are held liable to pay for damage. The company need not buy the minerals in the first instance, but if they find that the canal wants support they ought to pay for it. Sect. 39 is ancillary to sect. 38. The power to inspect there given is very wide and casts a duty on the canal company to make their election: either to have compensation assessed or to let the mine-owners go on

(1) 20 Q. B. D. 391.

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working at the risk of the canal company. That section enables the canal company to protect itself against breaches of duty by the mine-owners either in coming too near or (if compensation has been assessed) in passing the limit fixed by the jury. It is clear from the conveyance that the canal company purchased no right of support: neither does the Act give it. If the construction of the Court of Appeal be correct the company never would pay compensation for the support unless they feared the insolvency of the mine-owners. The natural construction is that the mine-owners are to work, subject to the condition and restriction that if the canal company is willing to pay compensation the mine-owners may be restrained. There being no provision for the mine-owner to give notice when he approaches the canal (as there is in later Acts) the scheme is to throw the matter on the vigilance of the canal company. If the mine-owner goes on working without requiring the canal company to treat he cannot recover compensation for injury to the further working of the mine, and so with the canal company.

The appellants' construction is that which has been put for more than fifty years upon similar enactments: *Dudley Canal Co.* v. *Grazebrook* (1). The sections are not identical, but they raise the same difficulties, and the principle applicable is the same: viz. that the canal company having declined to pay compensation the mine-owners are not liable for injury to the canal caused by working without negligence in the ordinary way and without doing any unnecessary injury. The only distinction between the present case and that is that there the limit was fixed at twelve yards: here the limit is to be fixed by the machinery of the Act. That decision was approved and followed by the Exchequer Chamber in *Stourbridge Canal Co.* v. *Earl of Dudley* (2), where Martin B. lays down the true canon of construction in such cases. A statute ought not to be construed to take away any one's rights, where any other construction is possible. Those decisions were followed by Lord Romilly in *Midland Ry. Co.* v. *Checkley* (3), and *Dudley Canal Co.* v. *Grazebrook* (4) was expressly approved by Lord Chelmsford in *Great Western*

(1) 1 B. & Ad. 59, 72, 74.
(2) 30 L. J. (Q.B.) 108.
(3) Law Rep. 4 Eq. 19.
(4) 1 B. & Ad. 59.

Ry. Co. v. *Bennett* (1), a case under the Railways Clauses Consolidation Act 1845 ss. 77–79. There are no doubt in *Cromford Canal Co.* v. *Cutts* (2) expressions unfavourable to the appellants' construction, but the decision is not.

[They also referred to sects. 1, 18, 19, and 33 of 31 Geo. 3 c. lxviii. and to *Caledonian Ry. Co.* v. *Sprot* (3).]

Sir *C. Russell* Q.C. (*Gully* Q.C. and *Smyly* with him) for the respondents:—

Apart from special enactments, the purchase of surface land, acquired either by voluntary agreement or under compulsory powers, carries with it the right of support from subjacent minerals, and if the purchase is for a purpose the accomplishment of which would throw a greater burden on the land than in its normal state, there would be a right of support for that burden. That being the state of common rights, the Act in question is passed to effect a public object, the making a canal of public utility. The company is bound not only to make but to maintain the canal. By the purchase of the lands in question the company acquired two things: first the surface; secondly a restriction on the working of the minerals, or a right of support. But if it is found in working the mines that minerals are required to be left which would otherwise be worked the mine-owners and the company are respectively authorized to take proceedings, the company to acquire, and the mine-owners to compel the company to acquire. When the Act passed it was not known whether there were minerals, or at least minerals worth working. The leading idea of sect. 37 is to prevent injury to the canal, and effect must be given to the words "not thereby injuring, &c., the canal." Those words are not in the Railways Clauses Consolidation Act 1845. Sect. 37 refers only to minerals under the canal. Sect. 38 is wider and refers also to mines near the canal. The true construction of that section is that the mine-owner can compel the assessment of compensation. The right of inspection conferred by sect. 39 is not a general one as contended for by the appellants; but if it were the company obviously cannot inspect

(1) Law Rep. 2 H. L. 27, 39. (2) 5 Railw. Cas. 442.
(3) 2 Macq. 449.

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from day to day: whatever their powers, their opportunities are inferior to those of the mine-owners. The main question is, has the mine-owner a right to initiate proceedings to prevent injury to the canal?

[He also contended that the judgment of the Court of Appeal was right for the reasons there given (1), and discussed the cases cited.]

Sir *R. Webster* A.G. replied.

The House took time for consideration.

June 4. LORD HALSBURY L.C.:—

My Lords, in this case the plaintiffs' claim is for damages for wrongful working of certain coal and other mines, and thereby injuring, prejudicing, and obstructing the plaintiffs' canal, land, and works, and for wrongfully injuring, prejudicing, and obstructing the plaintiffs' canal and works by working coal and other mines within, under, and near the lands made use of for the said canal and works, and for wrongfully taking away the support of the plaintiffs' canal, works, and land; and for an injunction to restrain the defendants from continuing to injure, prejudice, or obstruct the plaintiffs' said canal, land, and works by working coal or other mines within, under, or near lands made use of for the said canal and works, and to restrain the defendants from continuing to take away the support of the plaintiffs' canal and land.

Upon this special case the plaintiffs admit that before the defendants took and worked coal forming the adjacent and subjacent support of the canal, and thereby injured, prejudiced, and obstructed the canal, the defendants gave the plaintiffs notice that they were going to work the said coal, and that the plaintiffs declined to purchase or pay compensation to the defendants for leaving the coal forming the adjacent and subjacent support of the canal.

For the purposes of this special case the plaintiffs admit that before the defendants took and worked coal forming the adjacent

(1) 20 Q. B. D. 391.

and subjacent support of the canal, and thereby injured, prejudiced, and obstructed the canal, the defendants gave the plaintiffs notice that they were going to work the coal, and that nothing was thereupon done by the plaintiffs.

For the purposes of this special case the plaintiffs admit that the defendants took and worked all the said coal alleged to have been taken and worked by them as aforesaid in the usual mode, without negligence and without doing unnecessary damage, save in taking and working the same without leaving sufficient support for the canal.

My Lords, I think no general principle is involved in the determination of this case. It turns altogether upon the statute under which the question arises, and I myself have not been able to doubt the correctness of the conclusion at which Mr. Justice Cave and Mr. Justice Mathew arrived, affirmed as it afterwards was unanimously by the Court of Appeal.

My Lords, I, for myself, decline to consider any other statute proceeding on different lines and including different provisions. I think the Master of the Rolls was quite right in pointing out that the decision of this case in no way affects the Act of 1845, or indeed any other statute not enacted in the same terms. Different views of policy have from time to time prevailed, and accordingly different provisions have been made for the securing of private rights while sanctioning works which the legislature have considered to be works of public utility.

My Lords, I do not think one gets any help from the construction of other statutes passed at different times and in pursuance of different lines of thought. The *Dudley Case* (1) may have been quite right, and I should be very loth to say it was wrong; but the statute there seems to me to be distinguishable in such important respects from the statute now under consideration that I am unable to derive the least assistance from the decision in that case. The scheme and structure of the Acts are entirely different. Here the plain words of the 37th section make the mine-owner liable if he causes injury to the canal. No one seems to deny that that is the plain meaning of the words as they stand in the Act.

(1) 1 B. & A. 59.

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The argument appears to resolve itself into the construction of the 38th section of the Act. I agree with Fry L.J. that sect. 38 gives rights and remedies to a larger class of persons than the mine-owners who are mentioned in sect. 37. The section seems to me to contemplate the case of the mine-owner who is hindered by the existence of the canal from the further prosecution of his mining enterprise. It appears to me therefore I confess without any doubt or hesitation that the supposed injustice of construing the language in its natural and ordinary sense does not arise. But when I find the high authority of Lord Cottenham in favour of construing these words as I construe them, and that in no uncertain terms, in a decision which has now for many years been an unquestioned authority upon the subject, I certainly can feel no difficulty whatever in moving your Lordships that the judgment of the Court of Appeal be affirmed, and this appeal dismissed with costs.

LORD BRAMWELL:—

My Lords, my noble and learned friend Lord Macnaghten has favoured me with a copy of the opinion that he proposes to express to your Lordships upon this case. In it he says that "when the working of a mine has reached a point at which the mine-owner finds that having regard to the proximity of the canal and his statutory liability he cannot work further without some danger, or cannot work further to the same advantage as he could if the canal were not there, then it is open to him to initiate proceedings, and he is entitled to receive satisfaction for such minerals as shall be thought proper to be left for the security of the canal or the mine."

My Lords, in my opinion the question turns upon whether that is so or not; for if it is so, I then am entirely and clearly of opinion that the mine-owners, the appellants, ought to have taken those proceedings, and not have risked the mischief which it is alleged they have caused.

My Lords, whether or not I should upon my own faculties have come to the conclusion that it was open to them to initiate such proceedings I am not very clear about. I am not quite so clear as to the meaning of the words referred to, but it was

decided many years ago in a similar case before Lord Cottenham that it was open to the mine-owner to take such proceedings, and all the noble and learned Lords who heard this case are of the same opinion. Therefore I concur, and I do not merely acquiesce in a judgment that I differ from, but I say unfeignedly that I have no doubt that that is the right construction, and accordingly I think the appeal should be dismissed.

LORD FITZGERALD :—

My Lords, I also have had the privilege of reading the judgment which will presently be delivered by my noble and learned friend on my left (Lord Macnaghten), and I feel coerced rather unwillingly to arrive at the conclusion that the judgment of the Court below is right and ought to be affirmed.

LORD MACNAGHTEN :—

My Lords, I think it is impossible to come to any conclusion but that at which the Court of Appeal has arrived. The language of the Act is too plain. By sect. 37 all mines under lands acquired for the purpose of the undertaking are reserved to the owners. The section goes on to declare that, subject to the conditions and restrictions contained in the Act, the owners are to be at liberty to work their mines, "not thereby injuring, prejudicing, or obstructing" the canal or the works connected therewith. If these words are to have their ordinary meaning it cannot be disputed that the order under appeal is right. The appellants, however, contend that their meaning must be cut down or qualified. They say that if the words be taken literally it will be found on examining sect. 38 that cases may occur in which the mine-owner would have to leave his mines unworked without any possibility of getting compensation. That would be contrary to the course of legislation in this country. You cannot attribute to Parliament an intention to confiscate private property, unless the language of the enactment will admit of no other meaning. To escape from such a result they say you have only to introduce the qualification which was applied to similar words in the case of the *Dudley Canal Co.* v. *Grazebrook* (1). The

(1) 1 B. & Ad. 59.

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mine-owner must do no unnecessary damage to the navigation, or no extraordinary damage by working his mines out of the ordinary and usual mode.

This argument depends upon the meaning to be attributed to sect. 38. The appellants contend that the meaning is this: The proprietors of the canal and the mine-owners are each to look after their own property. If the proprietors of the canal apprehend danger or damage to the canal, they may set the commissioners in motion and secure the protection they require on the terms of paying compensation. If the mine-owner apprehends danger or damage to his mine he may set the commissioners in motion and obtain compensation for minerals left unworked for the security of the mine. But then, as the appellants observe, if that be the meaning of the section, a mine-owner is helpless if he apprehends that his working may injure the canal without injuring or endangering his own property.

I do not think that this is the true construction of sect. 38. That section must be read with sect. 37. The condition on which the statute allows the mines to be worked must be borne in mind. The section is framed on the supposition that the mine-owner keeps in view his statutory liability. And it is to be observed that in his case the damage and danger spoken of in the section are not damage and danger to the mine, but damage and danger to "the further working of the mine." It seems to me that the meaning of the section is this: The proprietors of the canal may apply to the commissioners if they apprehend damage or danger to the canal. On the other hand, when the working of a mine has reached a point at which the mine-owner finds that, having regard to the proximity of the canal, and his statutory liability, he cannot work further without some danger, or cannot work further to the same advantage as he could if the canal were not there, then it is open to him to initiate proceedings, and he is entitled to receive satisfaction for such minerals as shall be thought proper to be left for the security of the canal or the mine. If this be the true meaning there is no case left unprovided for, and there can be no reason for cutting down or qualifying the plain meaning of the condition under which the mine-owner is authorized to work. The liability imposed upon the

mine-owner continues until he protects himself by taking the course prescribed by the Act, and that course enables him to obtain full satisfaction for all the minerals which he is compelled to leave unworked.

The language and the scheme of the Act differ from the language and the scheme of the Act which came in question in the case of the *Dudley Canal Co.* v. *Grazebrook* (1). In that case a belt was to be left unworked on each side of the canal. A mine-owner desirous of working within that belt was to give three months' notice to the proprietors of the canal. They were then to be at liberty to inspect the mine in order to determine what minerals might be got without damage to the canal. If they neglected to avail themselves of this privilege the mine-owner was expressly authorized to work his mine. That express authority was, or at any rate was considered to be inconsistent with a provision contained in another section of the Act which empowered mine-owners to work their mines provided that "no injury be done to the said navigation." In order to reconcile the two sections it was held that the party working the mines was bound "to do no unnecessary damage or injury to the navigation, or no extraordinary damage or injury by working them out of the ordinary and usual mode." With that limitation the Court thought that all the parts of the Act were consistent with each other.

In the present case there are no inconsistencies to be reconciled. There is no protected belt; there is no provision for notice; and it is at least doubtful whether the proprietors of the canal have any power of inspecting adjoining mines, except in a case where the workings have been stopped by payment of compensation, and it is apprehended that the mine-owner is working in contravention of the statutory injunction consequent upon such payment. The scheme of the Act seems to be to make the security of the canal depend upon the mine-owner keeping in view his statutory liability.

The question is not without authority. The exact point was determined by Lord Cottenham in the case of *Cromford Canal Co.* v. *Cutts* (2). In that case, under an Act, identical in language

(1) 1 B. & Ad. 59. (2) 5 Railw. Cas. 442.

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with the Act under consideration, a mine-owner had initiated proceedings for the purpose of obtaining compensation for coal which, in view of his statutory liability, he did not venture to work. The company filed a bill to restrain these proceedings. The mine-owner in his answer alleged danger to the canal, but did not suggest any case of danger to the mine. The point taken before your Lordships was urged in that case, and *Dudley Canal Co.* v. *Grazebrook* (1) was cited. But Lord Cottenham dissolved an injunction which had been granted by the Vice-Chancellor. He held that if the coal-owner sustained injury by getting less coal, or by working in a less beneficial manner for the sake of not injuring the canal, he had a right to compensation, and that he might proceed, as he proposed to do, for the purpose of ascertaining whether or not there would be any injury either to the owner of the coal or to the canal company.

The decision in the *Cromford Canal Co.* v. *Cutts* (2) was pronounced upon an interlocutory application; but I do not agree that it is of less authority on that account. The question determined was the only question in the cause, and it depended simply on the construction of an Act of Parliament. In such a case an order on motion has, I think, the effect and weight of a judgment at the hearing.

I think that Lord Cottenham's decision was clearly right, and that this appeal must be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 4th June 1889.

Solicitors for appellants: *Rowcliffes, Rawle & Co. for Fullagar & Hulton, Bolton.*

Solicitors for respondents: *Clarke, Woodcock & Ryland for C. Moorhouse, Manchester.*

(1) 1 B. & Ad. 59.

(2) 5 Railw. Cas. 442.

[HOUSE OF LORDS.]

THE REV. OSWALD JOSEPH REICHEL (PAUPER) . . . . . APPELLANT;

AND

THE RIGHT REV. JOHN FIELDER MACKARNESS, LORD BISHOP OF OXFORD, AND THE PROVOST AND SCHOLARS OF QUEEN'S COLLEGE IN THE UNIVERSITY OF OXFORD . RESPONDENTS.

H. L. (E.)
1889
June 4.

Ecclesiastical Benefice—Resignation—Validity—Acceptance—Condition—Pecuniary Consideration—Simoniacal Contract—Revocation before Acceptance.

A present resignation by a parson of his benefice, executed by deed before witnesses and placed in the hands of the Ordinary, the Ordinary agreeing to postpone formal acceptance till a day named, is valid and cannot be revoked.

Scandal having arisen with regard to the conduct of a vicar, he was informed by the Bishop that he must either submit to an inquiry or cease to hold his benefice. Thereupon, in accordance with a proposal made by the Bishop in the interest of the parish and in mercy to the vicar, the vicar on the 2nd of June executed before witnesses, but not before a notary, an unconditional deed of resignation and sent it to the Bishop's secretary on the understanding that the Bishop would postpone formal acceptance until the 1st of October. On the 10th of June the vicar executed a deed cancelling and revoking the deed of resignation, and on the 16th of July he communicated the fact to the Bishop's secretary. The Bishop after the revocation signed a document dated the 1st of October accepting the resignation and declaring the vicarage void.

The vicar having brought an action against the Bishop and the patrons of the benefice claiming a declaration that he was vicar, that the resignation was void, and an injunction to restrain the defendants from treating the benefice as vacant:—

Held, affirming the decision of the Court of Appeal (35 Ch. D. 48), that the resignation was voluntary, absolute, validly executed, and irrevocable; and that the action could not be maintained.

APPEAL from a decision of the Court of Appeal (1).

The facts are stated in the report of the decisions of the Courts below (1), and for the purpose of this report sufficiently appear in the judgments in this House.

(1) 35 Ch. D. 48.

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March 11, 12, 14. The Appellant in person :—

The instrument of resignation was invalid because not signed in the presence of a notary or authentic persons. No ecclesiastical act such as the resignation of a benefice can be validly done except in the presence of a notary. This is a question of ecclesiastical law, and in determining what is ecclesiastical law great weight is to be given to ancient writers of accepted authority; and some, but less, weight to foreign jurists: per Lord Blackburn in *Mackonochie* v. *Lord Penzance* (1). According to the best authorities a public act such as this must be done before a notary. By the constitutions of Otto A.D. 1237, Nos. 27, 28 (Johnson's Canons ed. 1720), special provisions were made for sealing documents, and notaries public not being then in use in England the seals of authentic persons were to take the place of notaries. A resignation must be before a notary or authentic persons, i.e. bishops, deans, abbots, or their respective officials. This is recognised in the form of resignation given in Registrum Brevium pp. 306, 307, ending "sigillum reverendi etc.—Et nos etc." This instrument was a private one, not being before a notary or authentic persons, but an instrument of resignation to be valid must be a public one: Ayliffe's Parergon p. 305. By the Constitutions of Othobon No. 10, A.D. 1268 (Johnson's Canons ed. 1720) before the Bishop of Oxford could institute to the living proof of the vacancy must have been produced to him by the letters of the bishop of the diocese where the demise occurred—i.e. the Bishop of Salisbury in whose diocese the appellant then was—or by a public instrument, or by witnesses sworn. None of these requisite formalities were observed.

[LORD HALSBURY L.C. referred to Ayliffe's Parergon p. 482: "We ought to give credit to a seal against the person signing with it, if such seal be not denied, though it be but the seal of a private person."]

A resignation is a public act, being the surrender of a spiritual charge. Everything a bishop does as ordinary is a public act: everything done before him as ordinary is coram ecclesiâ and a public act.

(1) 6 App. Cas. at p. 446.

[LORD HALSBURY L.C. referred to Ayliffe's Parergon pp. 27–29, as to public acts.]

According to Gibson's Codex p. 823, a resignation cannot be by proxy: "And I take it (in practice) there is no way of resigning, but either to do it by personal appearance before the ordinary, or at least, to do it elsewhere before a public notary by an instrument directed immediately to the ordinary and attested by the said notary, in order to be presented to the ordinary by such proper hand as may pray his acceptance." This instrument never came formally or lawfully into the hands of the Bishop: having been sent by post to the deputy registrar who was by that deed the appellant's proctor designate, and as such was under the appellant's control. The proctor's attestation was untrue in fact and invalid in law, because the appellant had not validly resigned and the person attesting was his proctor. The attestation should have been by an independent notary. There can be no exchange or resignation by proxy: it must be personal: Archbishop Courtney's Constitution against Choppe-Churches A.D. 1791 (Johnson's Canons). A resignation to a layman is invalid and a serious offence; Corpus Juris Canonici, Decret. Greg. ix. lib. 1 tit 9 cap. 8: ibid tit. 4. A resignation to a proctor can be withdrawn at any time, so long as the proctor has not made the resignation on the incumbent's behalf. Here the resignation was sent to the proctor subject to the condition that it should not be accepted till the 1st of October. Till then the proctor could not present the resignation.

Next, assuming the resignation to be valid, it was naught without the bishop's acceptance. The acceptance of the Ordinary is absolutely necessary to avoid the living: *Marchioness of Rockingham* v. *Griffith* (1). Until acceptance the effect of the incumbent's resignation is to make the benefice voidable, not void: he remains incumbent with all his powers and rights, including the power of revocation: he is in the position (at the utmost) of one who has made a contract to resign.

It is admitted that a resignation is not valid unless it is made "purè, spontè, absolutè, et simpliciter." It must be "purè": *Bishop of London* v. *Ffytche* (2), reported more fully in Cunning-

(1) 3 Burn's Eccl. Law, 9th ed. p. 543. (2) 2 Bro. Parl. Cas. 211.

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ham's Law of Simony p. 52. The resignation here was not purè: the bargain being that the appellant should receive the tithe rent-charge up to the 1st of October. Such a contract is simoniacal. The primâ facie presumption always was that a resignation was simoniacal: Corpus Juris Canonici Decretal, Greg. ix. lib. 1 tit. 9 c. 10, where the grounds on which a resignation was allowed are stated. Any benefit makes a resignation simoniacal.

A resignation must be spontè. There cannot be a valid resignation enforceable against the incumbent's will. The bishop cannot accept a resignation unless at the moment of acceptance it is spontaneous. If the incumbent resigning repents before acceptance he can re-occupy. As long as it is in the hands of his mandatory he can withdraw it: Lyndwood Provinciale lib. ii. tit. 5 p. 107 (ed. 1679) note, "renuncians." Here the resignation was to the appellant's mandatory. *Heyes* v. *Exeter College, Oxford* (1) relied on by the Court of Appeal is no authority against the appellant. There the incumbent resigning wished the bishop to accept at the moment of acceptance.

A resignation must be absolutè. With a collateral condition it is not absolute. The only condition allowable is by way of exchange: Godolphin's Abr. Eccl. Law, pp. 277, 278 (ed. 1680). Here the letter accompanying the instrument made it conditional. According to foreign canonists a resignation can be cancelled up to the last moment even before the Pope, and even if the Pope has indorsed it "Fiat ut petitur," and it has been registered: 1 Van Espen, Jus Ecclesiasticum Universum, pars. 2, sect. 3, tit. 10, c. 8, No. 13. It may always be revoked before acceptance: Reiffenstuel, lib. i. tit. 9; de Resignatione p. 282 (ed. 1755) side-notes Nos. 38, 136–138, 140, 143, 148, 150; Ayliffe's Parergon, pp. 468, 469. A conditional resignation is no resignation at all, per Eldon L.C. (1827) in *Fletcher* v. *Lord Sondes* (2). In consequence of that decision 9 Geo. 4 c. 94 was passed making resignation bonds of a certain kind valid, but by sect. 6 excepting from the operation of the statute presentations, &c. (inter alia) by "any other body politic or corporate," which words apply to the present case—a presentation by a college. Again a resignation

(1) 12 Ves. 336.

(2) 3 Bing. 501, 598.

is illegal if intended to avoid criminal proceedings: *Martin* v. *Mackonochie* (1). A resignation though validly made and accepted must be set aside if made on consideration of compounding a crime, though the allegation of crime be (as it was in this case) false. Mere incontinence is not one of the grounds on which a resignation is allowed in Corp. Juris Canon., Decretal Greg. ix. lib. i. tit. 9 c. 10; and see lib. ii. tit. 14 c. 6.

North J. thought the appellant might have been deprived of his benefice; but this is erroneous, the offence was not criminous conduct. The Bishop ought to have satisfied himself judicially that there was good ground for proceedings: that there had been criminous conduct. Being therefore made under threat of proceedings the resignation was not spontè, and was invalid.

As for the passage in John the Devout relied on by Cotton L.J. that writer has never been accepted as an authority.

Lastly assuming the resignation to be valid the Court of Appeal went too far in making the declaration that the living was void on the 1st of October, there being no counter-claim by the Bishop for such a declaration. It is one thing to negative the declaration asked for by the claim that the living was not void, another to make an affirmative declaration.

F. Mackarness for the Bishop of Oxford, respondent, was not heard.

The other respondents (who were patrons of the living) were not represented.

The House took time for consideration.

June 4. LORD HALSBURY L.C.:—

My Lords, on the 28th of May 1886 Mr. Reichel then vicar of Sparsholt wrote the following letter to the Bishop of Oxford:—"Sparsholt Vicarage, Wantage, Berks, May 28, 1886.—My dear Lord Bishop.—I desire herewith to place in your hands my resignation of this benefice of Sparsholt-cum-Kingston Lisle conformably with your Lordship's wish, and at the same time I gratefully

(1) 8 P. D. 191, 195.

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accept your kind proposal to postpone acceptance of my resignation until a date to be agreed upon, your Lordship meantime permitting me to be absent. I am yours very obediently, Oswald J. Reichel." And on the 31st of May by desire of the Bishop, Mr. Davenport replied in the following words: "Oxford 31st of May 1886.—Sir,—The Bishop of Oxford desires me to send you a deed of resignation and to inform you that his Lordship proposes to date his formal acceptance of it on the 1st of October next and not to declare your benefice vacant until that date if the deed is at once executed by you and remitted to me, and if his Lordship also receives in the meantime an assurance of satisfactory arrangements for the care and duties of the parish during your absence. The deed requires to be executed by you before two witnesses, and if you are unable to obtain the attestation of a notary public in London it may be remitted to me attested by two persons. I am yours faithfully,—Thomas N. Davenport. The Rev. O. J. Reichel."

On the 2nd of June following Mr. Reichel inclosed, executed as a deed and witnessed, but not before a notary public, the document of resignation which had been inclosed to him and which sets forth that without compulsion fraud or deceit he did purely simply and absolutely resign into the hands of the bishop all right title and possession of and in the said vicarage of Sparsholt—and so forth.

On the 10th of June following Mr. Reichel executed another deed purporting to withdraw his resignation, and the sole question is whether he was at liberty so to withdraw it.

It appears to be suggested first that the allegation in the deed executed by himself that it was without compulsion is not true and that he was compelled in the sense of being threatened. But the argument seems to me to proceed upon a total misapprehension. It is impossible to contend that what happened here was compulsion in any sense.

Grave charges of immorality had been made against Mr. Reichel: whether true or untrue appears to me to be immaterial; that in a collateral trial they had appeared to be established was certain. I say "appeared to be," since I do not think the decision of that case necessarily involved a finding that Mr. Reichel

was guilty; but that without some investigation of his conduct, some form of inquiry as to whether the charges made against him were well founded, he could not continue to perform the duties of vicar of Sparsholt was abundantly clear, and the only compulsion which I find as a fact that Mr. Reichel could put forward was that he must either submit to such an inquiry as the Bishop should be advised to direct or that he should cease to hold his preferment of Sparsholt Vicarage.

I think it is absolutely established that Mr. Reichel himself voluntarily elected the latter alternative, and in pursuance of his determination to take that course he wrote the letter and executed the instrument of resignation to which I have referred.

It is then said that it was not executed before a notary. It seems to me that that is entirely immaterial. The books of authority, which are quoted by way of advice and precaution that there should be no difficulty in proof of the fact, suggest that resignations should be actually in person to the Bishop or executed in the presence of some persons selected as witnesses to prove the fact. But no authority whatever, I think, can be cited to shew that the presence of a notary is essential to the validity of a deed of resignation.

My Lords, I entertain some doubt whether the point principally relied on arises in this case when once the facts are understood. The arrangements for resignation on the one side and acceptance on the other seem to me to have been consummated before the supposed withdrawal of the resignation of Mr. Reichel. It is true that the Bishop agreed not to execute the formal document to declare the benefice vacant till the following 1st of October; but I decline to decide that when a perfectly voluntary and proper resignation has once been made and by arrangement a formal declaration of it is to be postponed, that is not a perfectly binding transaction upon both the parties to it; and I doubt whether in any view of the law such an arrangement could have been put an end to at the option of only one of the parties.

Mr. Reichel in his learned argument relied much on foreign canonists for the proposition that until the Bishop had actually in some formal manner accepted the resignation, and then and

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there declared the benefice vacant, it was competent to the incumbent to revoke a resignation however formal, however freely made, and however unqualified by condition or other taint of illegality.

I do not think that even if the authorities quoted were conclusive as to what is the ecclesiastical law of this country, Mr. Reichel would have made out his proposition.

In the passage quoted from Van-Espen there is no doubt that a proposition is found, which, unqualified and uncontrolled by the context, would seem to establish Mr. Reichel's point; but the passage is to be understood with reference to the Pope's Chancery and the proceedings in his camera in respect of which certain rules of procedure were established. This will clearly appear from other passages in the same treatise to which Van-Espen himself refers, to explain what he means. He says: Jus Ecclesiasticum Universum, pars. 2, sect. 3, tit. 10, cap. 3, "XIV. Per Regulam Cancellariæ, quæ hodie est 45 et inscribitur *De Consensu in resignationibus et pensionibus*: 'Papa voluit et ordinavit, quod super resignatione cujuscumque Beneficii Ecclesiastici, seu cessione juris in eo, quam in manibus suis, vel in Cancellaria Apostolica fieri contigerit, Apostolicæ litteræ millatenus expediantur, nisi resignans, vel cedens, si præsens in Romana Curia fuerit, *personaliter*, alioquin per procuratorem suum, ad hoc ab eo *specialiter* constitutum, expeditioni ejusdem in eâdem Cancellariâ expressè consenserit et juraverit, ut moris est. Etsi ipsum resignantem seu cedentem pluries super uno et eodem Beneficio, in favorem diversarum personarum successivè consentire contigerit, voluit Sanctitas Sua, quod primus consensus tenere debeat, et alii posteriores consensus, ac litteræ eorum prætextu etiam sub priori data expeditæ pro tempore nullius sint roboris vel momenti.

"XV. Hæc Regula fuit Edita ad tollendas fraudes quæ possent oriri; quia posset quis nomine alterius porrigere supplicationem resignationis, et alium privare Beneficiis. Nam consensus per supplicationem sufficiebat de jure communi. Igitur ad tollendas fraudes, cautum est requiri consensum præstitum per se, vel per procuratorem specialiter ad hoc constitutum.' Ita Choquier ad hanc regulam, num°. 9."

The latter paragraph (XV.) explains the meaning and object of

the rules of practice which I have indicated as being peculiar and special to the Pope's Chancery. It is therefore manifest that the general phrases which Van-Espen here uses, and which undoubtedly in terms make out Mr. Reichel's proposition, are to be qualified and understood only as applicable to the particular rules and procedure enacted as the rules of practice of the Pope's Chancery.

Whatever may be said in respect of this authority, it seems to me to indicate simply the practice of the Pope's Chancery, and to have been specially referable to rules made to check an evil, which, if Mr. Reichel's view of the law is correct, never could have existed. So far therefore as it is an authority at all, it rather points in the opposite direction. But in truth the laws ecclesiastical of this country, or, as Lord Coke calls them, the King's Ecclesiastical laws, are as much part of the peculiar and native jurisprudence of this country as the ordinary common law. In *Caudrey's Case* (1) the extent and degree to which the law of this country recognises the laws ecclesiastical is set forth with great minuteness and precision, and the Act 24 Hen. 8 c. 12 contains, as Sir Robert Phillimore says, a clear and dignified exposition of the law upon the subject of the liberties and constitution of the national church.

It is quite certain that none of the authorities quoted by Mr. Reichel from cases decided in an English Court support his contention. Such shadow of authority as there was appeared to come from text-writers whose phrases I think are not to be understood in the sense argued by Mr. Reichel.

The objection to a conditional resignation as expounded by all writers on the subject is founded upon the view that money or money's worth is to be obtained as a condition to the resignation, and it is treated throughout by the writers who have dealt with the subject as in its nature simoniacal, or as giving opportunities for simoniacal contracts. And the good sense and meaning of such an objection is apparent.

But there was no condition here at all. As I have already said, I find as a fact that Mr. Reichel agreed absolutely to resign rather than undergo the inquiry which the bishop would have

(1) 5 Rep. fol. 1, p. 1a.

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felt himself otherwise compelled to institute. Neither in form nor in substance was the resignation conditional.

It seems to me therefore that there is no ground for the complaint, and there is no authority for the proposition necessary to support this appeal. I am therefore of opinion that the appeal must be dismissed.

LORD WATSON:—

My Lords, I also am of opinion that no cause has been shewn for disturbing the judgment of the Court below in either of these cases. Of the many points discussed in the elaborate and learned argument addressed to us by the appellant in person, one only is deserving of serious notice, which relates to his alleged right to recall, on the 16th of July 1886, a resignation of his benefice of Sparsholt, which he had placed in the hands of his Ordinary on the 2nd day of the month preceding. Even upon that point a great part of the argument, and the authorities by which it was illustrated, appeared to me to have little relevancy to the state of facts with which we have to deal.

The appellant did not lodge his resignation in ordinary course with a view to its being first considered, and then either accepted or rejected. He had justly, or unjustly (it matters not which), been exposed to imputations calculated seriously to affect his character and usefulness as a clergyman; and these had been brought under the notice of his bishop, who gave him the option of being proceeded against as a criminous clerk, or of resigning his cure. The appellant chose the latter alternative, his Lordship having previously consented, if the deed was at once executed and placed in his hands to "date his formal acceptance of it on the 1st of October next, and not to declare your benefice vacant until that date." It was in these circumstances that the resignation, which is in terms absolute and unqualified, was sent to his Lordship's secretary on the 2nd of June, 1886, along with a letter by the appellant, intimating that it was executed "on the understanding that the bishop will postpone acceptance thereof until the 1st of October next."

I see no reason to doubt that the present resignation of a cure of souls, at, and after a future day named, if submitted to the

Bishop and accepted by him, would instantly become irrevocable, and that on the arrival of the day specified, all connection between the resigner and the cure would be severed. That appears to me to have been the substance of the arrangement between the appellant and the Bishop of Oxford, with this difference only which is not favourable to the appellant's contention. His resignation was delivered in pursuance of a mutual agreement which rendered formal or other acceptance altogether unnecessary; the terms of the agreement shewing plainly that the Bishop not merely was ready to accept, but insisted upon having it, in order that it might receive full effect upon the 1st of October following. The agreement was perfectly lawful; it being entirely within the discretion of the Bishop to judge whether the adoption of proceedings against the appellant, or his unconditional resignation as from a future date, would most conduce to the spiritual interest of the parish. The appellant assented to the arrangement, and on the 2nd of June 1886 did all that lay in his power to complete it. In these circumstances it is idle to consider what the appellant's position might have been, if there had been no such arrangement, and he merely had sent in his resignation without knowing whether it was to be accepted or not. He cannot in my opinion be permitted to upset the agreement into which he voluntarily entered, and which he has done all that he could to complete, upon the allegation that there was no formal acceptance of his resignation until the 1st of October 1886.

I have only to add that having had an opportunity of perusing the opinion which is about to be delivered by my noble and learned friend on my left (Lord Herschell), I desire to express my concurrence in it.

LORD FITZGERALD:—

My Lords, I concur, and I can add nothing with advantage.

LORD HERSCHELL:—

My Lords, the plaintiff appeals from a judgment of the Court of Appeal declaring that the benefice of Sparsholt, which had been held by him, became void on the 1st of October 1886, by

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reason of the resignation thereof by the plaintiff, with the approval and consent of the bishop, and the acceptance thereof as from that day, and declaring further that the attempted revocation of his resignation by the plaintiff was invalid and void.

The main question for your Lordships' consideration is, whether the plaintiff validly revoked his resignation before its acceptance so as to disable the Bishop from further proceeding upon it. Owing to scandal alleged to have arisen from the misconduct of the plaintiff, communications took place between himself and the Bishop, which resulted in his writing to the Bishop, on the 28th of May 1886, a letter in the following terms: "I desire herewith to place in your hands my resignation of this benefice of Sparsholt, conformably with your Lordship's wish, and at the same time I gratefully accept your kind proposal to postpone acceptance of my resignation until a date to be agreed upon, your Lordship meantime permitting me to be absent." In response to this the Bishop's secretary forwarded to the plaintiff for execution a deed of resignation, informing him that the Bishop proposed to date his formal acceptance of it on the 1st of October following. The plaintiff executed the deed of resignation and returned it, stating that he had executed it "on the understanding that the Bishop would postpone acceptance thereof until the 1st of October next." On the 10th of June following the plaintiff executed a deed cancelling and revoking the deed of resignation, and on the 16th of July he communicated the fact that he had done so to the Bishop's secretary. The Bishop, notwithstanding this, signed a document dated the 1st of October 1886, accepting the resignation and declaring the vicarage void. The appellant contends that it was not competent for the Bishop to do so, that his resignation was not complete until acceptance, and that down to that time he had a locus pœnitentiæ.

My Lords, the plaintiff, when he executed the deed of resignation, and placed it in the hands of the Bishop, had done all that was necessary on his part to denude himself of the benefice, though it is, no doubt, the case that no clerk can, without the consent of his ecclesiastical superior, effectually so denude him-

self. The Bishop has entrusted to him the duty and the right of considering whether, in the interest of the parishioners, the clerk ought to be permitted to resign his benefice, and it is for this reason, and to give an opportunity for this consideration, that the act of the clerk is not effectual until the Bishop has assented to it. I do not think the word "acceptance" means more than this assent of the Bishop, or that it need take any particular form. Now, in the present case, the Bishop had intimated to the plaintiff that he was willing to assent to his resignation, and it was in pursuance of this intimation that the resignation was placed in the hands of the Bishop. At the time the deed was executed, at the time the Bishop received it, and thenceforward down to and after the time of the alleged revocation, the Bishop was an assenting party to the resignation, and was known by the clerk to be so, and to have arrived at the conclusion that it was for the interest of the parish that the resignation should be allowed. It is true that he did not sign any document until after the alleged revocation, and that, in mercy to the appellant, he dated his acceptance as of a later date, so that the appellant might not be at once ousted of his benefice. But no authority in English ecclesiastical law has been cited to shew that, under such circumstances as I have detailed, a clerk can undo his act of resignation and retain his benefice, notwithstanding that the Bishop has arrived at the conclusion that it is for the interest of the parish that the clerk's resignation should take effect, and has so intimated to him. And I should strongly advise your Lordships not to create any such precedent. Indeed, I am not satisfied that where a clerk has unconditionally resigned his benefice into the hand of the Bishop he can, in any case, by a subsequent act debar the Bishop from accepting the resignation and thus avoiding the benefice. No very clear authority to establish that he can do so is to be found in any of the English text-writers on ecclesiastical law. And though passages were cited from foreign canonical writers on which much reliance was placed, it must be remembered that they had reference to a state of ecclesiastical law in many respects different to that which prevailed in England, and they are certainly not to be received here as an absolute guide. It is, however, unnecessary in the present case to go the

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length of saying that a resignation can never be withdrawn without the consent of the Bishop, for I am of opinion that it certainly cannot be so under circumstances such as those to which I have drawn attention.

It was argued further by the appellant that inasmuch as his resignation was tendered to the Bishop on the understanding that it was not to be accepted until a subsequent date, the resignation was a conditional one, and therefore void. I can see no ground for such a contention. The resignation was absolute. It was intended to take effect in any event. Nor do I see anything illegal in an arrangement that the Bishop should withhold his formal acceptance and delay the avoidance of the benefice, where such arrangement is not entered into in furtherance of a scheme which is itself illegal.

Other objections, of less general importance, were taken by the appellant. As to these, I desire only to say that I am unable to see that any one of them can be sustained, and that they are satisfactorily disposed of, in my opinion, by the learned judges in the Court below.

I am of opinion that the appeal should be dismissed.

LORD MACNAGHTEN :—

My Lords, I concur.

Order appealed from affirmed; and appeal dismissed.

Lords' Journals 4th June 1889.

Appellant in person.

Solicitors for the Bishop of Oxford, respondent: *Cunliffe & Davenport, for T. M. Davenport, Oxford.*

[PRIVY COUNCIL.]

BANK OF NEW SOUTH WALES . . . DEFENDANT;

AND

O'CONNOR . . . . . PLAINTIFF.

J. C.*
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Jan. 29, 30
March 9

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Mortgagor and Mortgagee—Remedies of Mortgagor—Redemption—Detinue.

Where there has been an equitable deposit of deeds to secure repayment of a loan an action of detinue cannot be maintained therefor prior to repayment. The remedy is by a suit for redemption, or by summary application for the deeds on terms of substituting for the security a sum of money equal to the amount secured with a proper margin. In cases of legal or equitable mortgage, a tender properly made and improperly rejected is not equivalent to payment.

APPEAL from a judgment of the Supreme Court (Aug. 26, 1887) upon points reserved at the trial, so far as the same awarded to the respondent £1500 subject to a set-off on counter-claim, and from another judgment (Nov. 2, 1887) affirming a verdict in favour of the respondent and dismissing the appellant's motion for a new trial.

The facts and proceedings are stated in the judgment of their Lordships.

The points reserved were (1) whether the evidence objected to on the ground of remoteness was admissible; (2) whether the verdict on the counter-claim should not be reduced to the amount claimed.

Finlay, Q.C., and *Lofthouse*, for the appellant, contended that the damages in question were too remote, and that the evidence thereof was inadmissible. There was no liability for the alleged injury to the respondent's business resulting from his inability to pay wages. The falling off of his business should be attributed

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR WILLIAM GROVE.

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to other circumstances than the detention of his deeds. If any damages were traceable to the appellant's detention, still those awarded by the jury were grossly excessive. Reference was made to *The Notting Hill* (1); *British Columbia Saw Mill Company* v. *Nettleship* (2).

Channell, Q.C., and *Gould*, for the respondent, contended that the damages were not too remote, and naturally followed from the wrongful act of the appellant. They were not so excessive as that they ought to be interfered with. With regard to the form of action detinue will lie where the detention is wrongful: see *Chilton* v. *Carrington* (3); *Phillips* v. *Hayward* (4); *Williams* v. *Archer* (5). Assuming that an action of detinue lies, on the question of the amount of damages see *Grébert-Borgins* v. *Nugent* (6); *Moore* v. *Shelley* (7); *Bodley* v. *Reynolds* (8); *Brewer* v. *Dew* (9); *Davis* v. *Oswell* (10); *Waters* v. *Towers* (11).

Finlay, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The question involved in this appeal is one of some importance to persons who may be concerned in lending or borrowing money on mortgage in Victoria.

There are no facts in dispute.

O'Connor, the plaintiff in the action, was a coach builder in Beechworth, a comparatively small town in daily communication by rail with Melbourne, and distant, apparently, some few hours' journey from that city. He was in a fair way of business. His profits, he says, averaged from £400 to £500 a year, and his business seems to have been increasing down to the end of 1886.

O'Connor kept an account with the Beechworth branch of the

(1) 9 P. D. 105, 113.
(2) Law Rep. 3 C. P. 499.
(3) 15 C. B. 95.
(4) 3 Dowl. 362.
(5) 5 C. B. 318.
(6) 15 Q. B. D. 85.
(7) 8 App. Cas. 285.
(8) 8 Q. B. 779.
(9) 11 M. & W. 625.
(10) 7 C. & P. 804.
(11) 8 Ex. 401.

Bank of New South Wales from October, 1884. In the course of the next two years he somewhat crippled his resources by contesting a seat in the Legislative Assembly, and by incurring some expense in furnishing a house on the occasion of his marriage. He borrowed from his mother, Mrs. Pye, who lived in Melbourne, two sums of £150 and £200, without security, both of which he paid back with interest. He also incurred a debt of £100 to the bank. To secure that sum he deposited the title deeds of a small plot of ground where he carried on his business. The land is said to have been worth £200, and the buildings on it, which were of wood, and about eight years old, some £400 more. He acquired the property from his uncle by a voluntary conveyance in January, 1886. He mortgaged it to the bank by a deed dated the 22nd of February, 1886, which was duly registered. The mortgage was in the form of an absolute conveyance in trust for sale. The proceeds were to be applied in payment of expenses, and then in satisfaction of the debt with interest, and the surplus was to be paid to the debtor as personal estate. The deed had a proviso that nothing therein contained should extinguish, prejudice, or affect any lien or security which the bank was entitled to in respect of the deposit of the title deeds relating to the property.

On the 24th of January, 1887, O'Connor's working account with the bank was in credit to the amount of £1 4*s.* 9*d.* On the following day it was overdrawn, and it was never again in credit. On the 4th of February, Hannaford, the manager of the bank at Beechworth, wrote to O'Connor, stating that his account was £61 overdrawn, and requiring him to pay in £125 to cover the overdraft and some bills maturing that day. Besides his working account and the account secured by the mortgage of February, 1886, O'Connor had a discount account with the bank. It comprised two classes of bills discounted for him by the bank, (1) bills of which he was indorsee, and (2) acceptances of his discounted at his request for the convenience of other persons. In reply to Hannaford's letter O'Connor called at the bank, and said that he could not pay in £125 straight off at such short notice. He seems to have satisfied Hannaford that the bills referred to in his letter were or would be provided for.

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On Monday, the 14th of February, Hannaford wrote again to O'Connor, stating that his working account was £67 overdrawn, that it was the balance day of the week, and that O'Connor must get the account largely reduced before 3 o'clock. He added that he hoped that O'Connor did not give out any wages cheques on Saturday. O'Connor went immediately to the bank, and assumed a somewhat indignant tone, apparently on the ground that he had been in the habit of having an overdrawn account. It was a strange way of doing banking business, he said, to send him a letter on Monday, knowing his wages cheques were all paid on Saturday. However, he got Hannaford to promise to honour some small cheques of his which were outstanding, and then he said, "One thing, you won't trouble me much longer with letters of this kind. I'll go to Melbourne some time this week and get enough money to carry on independent of the bank."

On Friday, the 18th of February, O'Connor called at the bank and said he was going to Melbourne to get the money to carry on his business. Thereupon, at his request, Hannaford consented to pay a bill for £12 15s. which would fall due on the next day. O'Connor promised to be back about Wednesday, the 23rd.

O'Connor went to Melbourne and saw his mother. She promised to lend him £600. She said at the trial he might have had £1000. She advanced him £300 in cash, on the terms that the money was to be used for lifting his deeds at the bank, and for no other purpose. He was to take his sister with him to the bank and hand over the deeds to her. The deeds were to be brought back or the money restored at once.

O'Connor returned to Beechworth on Saturday night. The wages of his men, which were due at 1 P.M. on that day, were unpaid. When he returned home he had only £6 or £8 of his own, and he owed about £20 for wages. The men reassembled for work on Monday, the 21st. He told them he would pay them at dinner time, but he failed to do so, and some of the men struck work then and there.

On the same day, Monday, the 21st—but whether before or after this occurrence is not stated—O'Connor went to the bank with his sister, taking with him his mother's money in a bag. Hannaford had made out O'Connor's account up to the 23rd of February,

shewing a balance of £371 3*s.* 4*d.* in respect of indebtedness and liability. The items shortly were as follows:—

	£	*s.*	*d.*
Secured account	103	12	0
Working account	81	14	5
Discount account:—			
As indorsee	106	7	6
As acceptor	79	9	5
	£371	3	4

O'Connor objected to the last item of £79 9*s.* 5*d.*, saying it was "monstrous," as the bills would not be due for months. He struck it out, and then tendered the balance and demanded his securities. Hannaford refused to hand them over unless the whole amount of debt and liability were cleared off, saying he had to obey instructions. O'Connor observed that he had to return the money or take back the deeds at once. Hannaford then said that he would send the deeds and bills to the head office in Melbourne. O'Connor, after consideration, said that he would take the money to Melbourne, and he asked for and obtained a copy of the document on which the bank relied. It does not appear that O'Connor told Hannaford, at that interview, how he was situated with his workmen, or that he asked for any further indulgence from the bank.

Instead of taking the money to Melbourne at once, O'Connor wrote a letter to his mother, which she seems to have mislaid. On Tuesday, the 22nd, she sent a reply in the handwriting of her son, a boy of about eight or nine years old, which said: "Ma went to the bank and found that the money did not come down. Ma is annoyed about it, as she expected the money to be there to-day. Ma said she does not want no humbugging with you." On receipt of this letter O'Connor went to Hannaford and said his mother had written to him an angry letter, and that he should now be unable to get money from her. On Thursday O'Connor took the money back to his mother.

On Saturday, the 26th of February, Hannaford wrote to O'Connor, saying that he had had a communication from the head

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office, and that the bank would not insist on payment of the £79 9*s.* 5*d.*, less rebate, though they were entitled to do so.

On the 28th of February the writ in this action was issued.

On the 8th of March the bank waived their claim to a general lien.

Under these circumstances, if O'Connor had brought an action for redemption on the day on which the writ was issued, he might possibly have been entitled to costs up to the 8th of March. On the other hand, if he had persisted in the action after the bank offered to release the securities on payment of the amount expressly secured, he would, according to the ordinary and settled practice of the Court, have had to pay the costs of the action.

A mortgagee is entitled to his principal and interest, and the ordinary charges and expenses connected with the security. He is also entitled as of right to the costs properly incident to an action for foreclosure or redemption, though he may forfeit those costs by misconduct, and may even have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably. In *Cotterell* v. *Stratton* (1) Lord Selborne observes that this right, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or culpable neglect of his duty under the contract, and that any departure from these principles would tend to destroy, or at least very materially to shake and impair, the security of mortgage transactions, and he goes on to point out that such a departure, instead of being beneficial to those who may have occasion to borrow money on security, would, in the result, throw them into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions. In the present case it is not easy to understand how the bank, or their manager, can be charged with vexatious or unreasonable conduct. It is admitted that Hannaford acted in good faith. Whether the claim to a general lien was well founded or not, there was some colour for it in the mortgage deed. Considering that the bank were careful to take a formal security for £100, it is difficult to suppose that they would have allowed O'Connor to get so deeply into their books, or that he would have assumed so

(1) Law Rep. 8 Ch. 295.

bold and defiant a tone in his communications with Hannaford, if it had not been taken for granted on both sides that the bank had some security in their hands. Hannaford was merely a subordinate, acting under instructions, as O'Connor knew. O'Connor had given no notice that he intended to draw a line at a certain point in the account. There was no opportunity of consulting the head office. Hannaford, therefore, seems to have taken a reasonable course in sending the deeds up to Melbourne, where Mrs. Pye lived. O'Connor apparently acquiesced at the time in the course proposed. That the affair was not completed in Melbourne was not the fault of the bank or the fault of Hannaford. Unless due to a capricious change of purpose on the part of Mrs. Pye, or to a determination on O'Connor's part to bring a speculative action, it must have been due to want of confidence created in Mrs. Pye's mind by O'Connor's failure to return the money to her at once. On the notes of the evidence there is nothing to account for it but this passage in O'Connor's deposition,—"My mother would not lend me the money again. She was angry with me."

The action, however, which O'Connor brought against the bank was not an action for redemption. It was an action of detinue. The writ was issued in haste. But the statement of claim was not delivered until the 14th of April. It is certainly a singular document. It does not refer to the mortgage of February, 1886, or notice the fact that the deeds were deposited as a security. It simply states that the bank on the 21st of February, 1887, detained, and had always since such time detained, from the plaintiff his title deeds. It specifies the deeds, and states that by reason of such detention the plaintiff had suffered damage as follows: "He was rendered unable to procure a loan of £600 from Annie Pye. . . . and unable to pay his workmen in his business of coach builder, and was compelled to discharge some of his said workmen, and was rendered unable to meet his liabilities in his said business, and was sued in respect thereof, and his credit was injured and his trade diminished, and his said business was otherwise injured." Then it claims a return of the deeds, or £1000 for their value, and £2000 for their detention.

The defence was delivered on the 29th of April. It is equally

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remarkable. For some unexplained reason, the bank also abstained from referring to the mortgage of February, 1886, which apparently in any view would have been an answer to the action as framed. But they did plead that before the alleged detention the plaintiff deposited the said deeds with them to secure the repayment of £100, and that the said sum was due at the time of the detention, and still remained due. Without admitting liability, they brought into Court £50 and one shilling, and they delivered a counter-claim for money due to them.

In reply, the plaintiff admitted the deposit by way of security, as well as the fact that the sum intended to be secured was due at the time of the detention, and still remained due. He then stated the tender on the 21st of February, and its refusal.

Instead of applying to have the question raised by the pleadings disposed of at once, and the action stayed or dismissed, the bank allowed the action to be set down for trial. It came on to be tried on the 20th of July, 1887, before Mr. Justice Holroyd and a jury. In addition to proof of the facts already stated evidence of a somewhat loose and unsatisfactory description was offered, with the view of proving the special damages alleged in the statement of claim. This evidence was objected to, on the ground that the damages claimed were too remote. The learned judge admitted the evidence, but reserved the question of its admissibility for the consideration of the Full Court. No evidence was given on the part of the defence. The jury estimated the value of the property at £700. They gave £1500 damages for detention, and they found that there was due to the bank under the counter-claim the sum of £284 2*s.* 7*d.*, which was afterwards reduced by consent to £202 1*s.*

The question reserved came on to be argued before the Full Court on the 10th of August, 1887, when it was held that the evidence objected to was admissible.

On the 26th of August, 1887, on motion for judgment, the Court adjudged:—

1. That the plaintiff recover against the defendant £1500 on his claim.
2. That the defendant recover against the plaintiff the sum of £202 1*s.* on the counter-claim.

Provision was made for set-off and payment of the balance, and the bank renouncing any further claim on the deeds, the subject of the action, they were to be delivered up to the plaintiff. The bank was ordered to pay the costs of the action and the costs of the argument before the full Court, after deducting the costs of the counter-claim.

On the 2nd of November, 1887 the bank moved the Full Court for an order to set aside the verdict for the plaintiff, on the grounds that it was against the weight of evidence, that the damages were excessive, and that evidence had been improperly admitted. The only ground argued was that the damages were excessive. The Court ordered that the verdict should be affirmed, and that the motion for a new trial should be dismissed, with costs.

The bank has appealed to Her Majesty in Council from the two orders of the Full Court and the judgment of the 26th of August, 1887.

The whole matter is therefore open with this exception, that the bank cannot now be permitted to rely upon the legal mortgage of the 22nd of February, 1886, although it was put in evidence at the trial by the plaintiff. They deliberately elected to treat the case as if they had only an equitable mortgage by deposit, and the appeal must be decided on that footing.

The learned counsel for the appellants dwelt with much force on the extravagance of a verdict which even their opponents described as liberal, and on the novel dangers to which mortgagees would be exposed if such a verdict were upheld. They contended too that no damages, or at any rate no substantial damages, were due either in fact or in law. These contentions and the arguments by which they were supported would be worthy of careful attention if it were necessary to consider them. But in their Lordships' opinion there is a more serious question which must be disposed of in the first instance. That question is raised on the pleadings, though the attention of the Court below was apparently not called to it. The appellants are to blame as well as the respondent for the way in which the litigation was conducted. But their Lordships are not at liberty to countenance a departure from settled principles, because in the conduct of the action both parties have chosen to ignore them.

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The question that suggests itself is, can such an action as this be maintained? It was treated by the learned counsel for the respondent, and indeed by the learned counsel for the appellants during a great part of their argument, as an action for damages occasioned by a wrongful act arising out of breach of contract. What is the wrongful act? And what is the breach of contract? Their Lordships have not had the advantage of seeing a note of the summing-up. But in the Full Court the learned judge who tried the case states his view as follows:—"In my opinion there was a contract here to deliver up the deeds on payment of a certain sum of money. That was broken when the money was tendered and ought to have been accepted. Then the bank was in the same position as if it had actually taken the money and then refused to deliver up the deeds. That was a wrongful detention of another man's property, and therefore a tort." The bank was no doubt bound to deliver up the deeds on payment of the sum secured, with interest and costs, if any. But, in their Lordships' opinion, there is no foundation for the proposition that a tender properly made and improperly rejected is equivalent to payment in the case of a mortgage. The proposition seems to be founded on a mistaken analogy. If a chattel be pledged, the general property remains in the pledgor. The pledgee has only a special property. According to the doctrines of common law, that special property is determined if a proper tender is made and refused. The pledgee then becomes a wrongdoer. The pledgor can at once recover the chattel by action at law. But it is not so in the case of a mortgage, where the mortgagor's estate is gone at law, nor is it so in the case of an equitable mortgage. A mortgagor coming into equity to redeem, must do equity and pay principal, interest, and costs before he can recover the property which at law is not his. So it is in the case of an equitable mortgage. It is a well established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit. In the absence of consent that charge can only be displaced by actual payment of the amount secured. Before the fusion of law and equity a Court of Equity would undoubtedly have restrained

the legal owner of the property from recovering his title deeds at law so long as the charge continued, and now when law and equity are both administered by the same Court if there be any conflict the rules of equity must prevail. In *Postlethwaite* v. *Blythe* (1), where property had been conveyed to secure a debt of a comparatively small amount, the Lord Chancellor refused to direct a release upon payment into Court of the largest sum to which the debt would in probability amount. Lord Eldon said: "I take it to be contrary to the whole course of proceeding in this Court to compel a creditor to part with his security till he has received his money. Nothing but consent can authorize me to take the estate from the plaintiff before payment." To some extent the strictness of that rule has been relaxed in modern times, and it is now the practice, where a proper tender has been made and refused, to make an order giving the mortgagor liberty to pay into Court a stated sum sufficient to cover the amount of principal and interest and the probable costs of the suit, and then upon payment into Court, but not till then, the mortgagee is required by the order to deliver up the title-deeds. It would be contrary to equity to order a mortgagee to deliver up the title deeds of property on which he has a security upon any other terms. A mortgagor has no right even to see the deeds before payment. It is no hardship upon the mortgagor, for if he has made a proper tender he can always obtain his deeds on a summary application on the terms of substituting for the security a sum of money equal to the amount secured, with a proper margin. A form of order adapted to such a case is to be found in Seton on Decrees, 4th ed., p. 1040.

No doubt it is the duty of a mortgagee, on proper notice, or without notice in a case where notice is not required, to accept a proper tender. No doubt that duty is founded upon contract. But there are other terms of the contract of at least equal importance. A Court of Equity can take all the circumstances of the case into consideration, and do complete justice between the parties, however complicated their relations may be. That is not within the province or power of a jury. If a mortgagee rejects a tender he rejects it at his own risk, and in an

(1) 2 Sw. 256.

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action for redemption he may be refused his costs in consequence, or may even be ordered to pay costs. Further a proper tender will stop the running of interest if the mortgagor keeps the money ready to pay over to the mortgagee: *Gyles* v. *Hall* (1). But there is no authority for saying that refusal to accept a proper tender is a breach of contract, for which an action at law will lie.

The learned counsel for the respondent were invited to produce some authority for such an action. One case, and one case only, was cited as a precedent. In *Chilton* v. *Carrington* (2), the experiment was tried once and again. But the result of two actions in that case, so far as they are reported, affords but little encouragement for a repetition of the experiment.

In *Chilton* v. *Carrington* (2) the assignee of a bankrupt publican sought to recover the title deeds of a public-house, which had been deposited with the defendants to secure a sum of £150. The action was brought after tender. The plaintiff sued for detention of the deeds, which were described in the declaration as "goods and chattels," and for damages. The defendants did not put in an equitable plea, but their case was that the deposit was intended to secure an account for beer as well as the £150. That question was tried on demurrer. It was held that the deposit was only a security for the £150. The parties then went to trial, and there being no equitable defence, they agreed that the jury should find the damages for the detention, and that they should not be required to assess the value of the so-called goods and chattels. Upon this arrangement the jury found a verdict for £60 damages. The plaintiff then applied to the judge in chambers for delivery up of the deeds. The defendants urged that they ought not to be required to deliver up the deeds before payment. The learned judge, however, made the order. The defendants then applied to the Full Court to set aside the order, and argued that, according to the settled principles of equity, they could not be required to part with their security until they were paid. The learned judges were puzzled by the course which the parties had taken. In the course of the argument, addressing the counsel for the

(1) 2 P. Wms. 377. (2) 15 C. B. 95, 730; 16 C. B. 206.

defendants, Mr. Justice Williams observed with perfect accuracy, "If you are right the plaintiff ought not to have succeeded in the action." Ultimately the Court got over the difficulty, by setting aside the order in chambers, on the ground that by arrangement between the parties the jury had been discharged from finding the value of the deeds detained. As the result of that action the plaintiff was no nearer getting back his deeds. However, he still contended that, having made a proper tender and that tender having been refused, he was entitled to have his deeds without payment of the money. So he brought another action of detinue. On this occasion the defendants were better advised, and they put in a plea by way of equitable defence that the deeds were deposited to secure £150, and that that sum remained unpaid. On argument the Court allowed the plea to be put in, and nothing further seems to have been heard of the action.

That case, so far from being an authority in favour of the respondent, is really an authority against him.

Their Lordships are therefore of opinion that it is clear, both on principle and authority, that such an action as the present cannot be maintained. Under these circumstances, their Lordships do not propose to give any opinion as to the admissibility of the evidence objected to or as to the amount of the damages recovered. Those questions, in the view of their Lordships, cannot arise.

The proper order will be to dismiss the action, to allow the verdict on the counter-claim as reduced by consent to stand, and to direct payment to the appellants of the reduced amount, together with interest and the costs of the counter-claim.

As to the costs of the action, having regard to the way in which the bank has acted in the conduct of the litigation, their Lordships have come to the conclusion that there ought to be no costs on either side, and there will be no costs of the appeal.

Their Lordships will humbly advise Her Majesty accordingly.

Solicitors for appellant: *Wadeson & Malleson.*
Solicitors for respondent: *Geare, Son, & Pease.*

[PRIVY COUNCIL.]

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Jan. 23, 24, 25; April 3.

COOPER . . . . . PLAINTIFF;

AND

STUART . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Crown Grants of Land—Right to resume—Rule against Perpetuities inapplicable to Crown Grants in the Colony.

Held, that a reservation in a Crown grant made in 1823 of land in New South Wales of a right to resume any quantity thereof not exceeding ten acres, as may be required for public purposes, does not constitute an exception repugnant to the grant and therefore void. Such resumption when carried into effect operates as a defeasance.

Held further, that whether or not the Crown in England would be affected by the rule against perpetuities, such rule was nevertheless inapplicable in 1823 to Crown grants of land in the Colony or to reservations or defeasances in such grants to take effect on some contingency more or less remote and only when necessary for the public good.

APPEAL from a decree of the Supreme Court (May 17, 1886), affirming a decree of the Primary Judge in Equity (Aug. 17, 1885) which dismissed the suit with costs.

The question in this appeal is whether an exception or reservation of such quantity of land not exceeding ten acres as might be required for public purposes contained in a grant by the Crown of lands in fee simple subject to a quit rent is void.

The facts of the case and the proceedings in the suit are set out in the judgment of their Lordships.

Rigby, Q.C., and *Haldane*, for the appellant, contended that such reservation or exception was void for repugnancy. Reference was made to Davidson's Conveyancing (4th ed.) vol. 5, p. 167, for a summary of the law relating to exceptions and reservations. A grant reserving part of the thing granted is void as to the reservation: *Horneby* v. *Clifton* (1); *Kenson* v. *Reading* (2);

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR WILLIAM GROVE.

(1) Dyer's Rep. 264; see also Co. Litt. 47 a. (2) 1 Cro. Eliz. Rep. 244.

Stukeley v. *Butler* (1); *Lord* v. *Commissioners for Sydney* (2). The reservation is also void as violating the rule against perpetuities which applied to the Colony in the year 1823: *London and South Western Railway Company* v. *Gomm* (3); Lewis on Perpetuities, p. 164 and p. 609. [LORD FITZGERALD:—Is there any case where a reservation has been held void for perpetuity when the Crown is the grantor? LORD WATSON referred to *The Buckhurst Peerage* (4)]. See *Flower* v. *Hartopp* (5); *The Wiltes Peerage* (6). There is no prerogative in the Crown to interfere with the rules of common law. Those rules of common law have been introduced into the Colony: see *Attorney-General* v. *Stewart* (7) and *Whicker* v. *Hume* (8) and the Act of Parliament there cited. By those rules the Crown is forbidden to make in this country such a reservation as here stipulated, and it lies upon the other side to shew that nevertheless it could do so in the Colony in the exercise of prerogative and in the interests of the public.

Sir *H. Davey*, Q.C., and *Leverson*, for the respondent, contended that the reservation was not void for repugnancy. It operated as a defeasance: see *Lord* v. *Commissioners for Sydney* (2). As regards the prerogative of the Crown the power of making such a reservation was within it, and its exercise was necessary and proper for the public benefit. Grants by the Crown are not subject to the same rules of law as are grants between subjects, and the rule against perpetuities does not apply to grants by the Crown, which can even convey in fee with a condition restraining the grantee from alienating. Nor does it apply to common law conditions in defeasance of a freehold, or any other strictly common law conditions. Reference was made to *London and South Western Railway Company* v. *Gomm* (3); Co. Litt. Hargrave's Notes, 201 a, 216; Brooks' Abridgment, tit. 'Prerogative,' No. 102; Chitty's Prerogatives of the Crown, p. 386, note (*h*), and p. 388; *Fowler* v. *Fowler* (9); Viner's Abridgment, tit. 'Prerogative of the King,' vol. 17, p. 154; 6 Bacon's Abridgment, tit. 'Prerogative,'

(1) Hobart's Rep. 300.
(2) 12 Moore's P. C. Cases, 473.
(3) 20 Ch. D. 562.
(4) 2 App. Cas. 1.
(5) 6 Beav. 476.
(6) Law Rep. 4 H. L. 126.
(7) 2 Mer 143.
(8) 7 H. L. C. 134.
(9) 16 Irish Ch. Rep. 507.

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sect. E. 3; *Flower* v. *Hartopp* (1); *Yeap Cheah Neo* v. *Ong Cheng Neo* (2). See Challis' Law of Real Property, pp. 152, 3. As to the extent to which the rules of common law have been introduced into the Colony: see 9 Geo. 4, c. 83, s. 20; 5 & 6 Vict. c. 76; Blackstone, vol. i., p. 107; *Attorney-General* v. *Stewart* (3).

Rigby, Q.C., replied.

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April 3.

The judgment of their Lordships was delivered by

LORD WATSON:—

His Excellency Sir Thomas Brisbane, then Governor-in-Chief of New South Wales and its dependencies, on the 27th of May, 1823, made a grant to one William Hutchinson, his heirs and assigns, of 1400 acres of land in the county of Cumberland and district of Sydney, "reserving to His Majesty, his heirs and successors, such timber as may be growing or to grow hereafter upon the said land which may be deemed fit for naval purposes; also such parts of the said land as are now or shall hereafter be required by the proper officer of His Majesty's Government for a highway or highways; and, further, any quantity of water, and any quantity of land, not exceeding ten acres, in any part of the said grant, as may be required for public purposes; provided always, that such water or land so required shall not interfere with, or in any manner injure or prevent the due working of the water mills erected or to be erected on the lands and watercourses hereby granted."

The appellant is the successor in title of William Hutchinson, the original grantee.

By a proclamation, dated the 4th of November, 1882, duly made and published, His Excellency Lord Augustus Loftus, the Governor of the Colony, in pursuance of the reservation in the grant, and on the recital that the land (the subject of this action) was required for a public park, gave notice that he thereby resumed and took possession on behalf of the Government of the Colony of a parcel of land ten acres in extent, being part of the

(1) 6 Beav. 476. (2) Law Rep. 6 P. C. 393.
(3) 2 Meriv. 143.

1400 acres granted to the predecessor in title of the appellant, to the intent that these ten acres should revest in Her Majesty to be used as and for a public park. In terms of the proclamation the Government at once proceeded to take actual possession of the land, fenced it off, and excluded the appellant.

On the 17th of November, 1884, the appellant brought the present action, in which he prays for (1) a declaration that the reservation to the Crown to resume any quantity of land not exceeding ten acres is void; (2) an injunction to restrain the respondent, as representing the Government, from continuing in possession of the land resumed; and (3) an account of the damage sustained by him. The whole controversy between the parties turns upon the first of these conclusions, to which the second and third are merely consequential. There are no facts in dispute, it being conceded by the appellant, that, assuming the reserved power to be valid in law, it has been duly exercised. But he maintains that the clause of resumption is invalid on these grounds, (1) that being in substance an exception it is void for repugnancy, and (2) that it violates the rule against perpetuities.

In support of the first of these objections the appellant's counsel relied upon a well-known class of authorities such as *Horneby* v. *Clifton* (1), where the grant by husband and wife was of "the messuage or tenement in Fleet Street, called 'The Three Conies,' with all the chambers, cellars and shops, &c., excepting and reserving to the husband, the shops for his own sole use and occupation," and it was held that the exception being of all the shops, and therefore repugnant to the grant, was void. And so of a grant of twenty acres by particular names excepting one acre, the exception is repugnant (Touchstone, 79). Assuming these authorities, and the very technical rule which they establish, to be applicable to a Crown grant of public property in a young Colony, it appears to their Lordships that the reservation in the grant of 1823 does not constitute an exception within the meaning of the rule.

An exception is that by which the grantor excludes some part of that which he has already given, in order that it may not pass

(1) Dyer, 264 a.

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by the grant, but may be taken out of it and remain with himself. A valid exception operates immediately, and the subject of it does not pass to the grantee. Their Lordships are of opinion that the grant to Hutchinson carried to him the whole 1400 acres, but subject to a defeasance as to 10 acres. The whole and every part of the lands granted vested, and have, from the 27th of May, 1823, to November, 1882, been in the ownership and possession of the grantee or his representatives, subject to that provision, which the plaintiff describes in his statement of claim as a "reservation of a right to resume any quantity of land, not exceeding ten acres, in any part of the said grant." It is obvious that such a provision does not take effect immediately, it looks to the future, and possibly to a remote future. It might never come into operation, and when put in force it takes effect in defeasance of the estate previously granted, but not as an exception.

In support of the second objection, it was maintained for the appellant, in the first place, that the English rule against perpetuities, as now settled, applied in all its entirety to the Colony of New South Wales in the year 1823; and, in the second place, that the rule, as established in the law of England, applies to reservations made by the Crown in the interests of the public.

Both of these propositions were contested by the respondent's counsel. They maintained that there is no authority for extending the rule to a Crown grant in England; and pointed out that the Crown may lawfully annex a condition against alienation on a grant of fee, and other conditions which are not competent to a private person. They argued also that, although the rule had been applied to conveyances operating under the Statute of Uses, it had not been applied to common law conditions, or conditional limitations in common law grants which existed before that statute.

It does not appear to their Lordships to be necessary, for the purposes of the present case, to decide whether the Crown, in attaching such reservations to grants of land in England, would be affected by the rule against perpetuities. In order to succeed in this appeal, it is not enough for the appellant to establish that the Crown would be within the rule here; he must also shew that the rule, in so far as it affects the Crown, was operative in

the Colony of New South Wales at the time when his land was originally granted to William Hutchinson; and that, in the opinion of their Lordships, he has failed to do.

The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done, the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute. The often-quoted observations of Sir William Blackstone (1 Comm. 107) appear to their Lordships to have a direct bearing upon the present case. He says:—

"It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force (Salk. 411, 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance of the established Church, the jurisdiction of spiritual Courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are

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not in force. What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the decision and control of the King in Council; the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother country."

Blackstone, in that passage, was setting right an opinion attributed to Lord Holt, that all laws in force in England must apply to an infant Colony of that kind. If the learned author had written at a later date he would probably have added that, as the population, wealth, and commerce of the Colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it; and that the power of remodelling its laws belongs also to the colonial legislature.

Their Lordships have not been referred to any Act or Ordinance declaring that the laws of England, or any portion of them, are applicable to New South Wales. There was no land law or tenure existing in the Colony at the time of its annexation to the Crown; and, in that condition of matters, the conclusion appears to their Lordships to be inevitable that, as soon as colonial land became the subject of settlement and commerce, all transactions in relation to it were governed by English law, in so far as that law could be justly and conveniently applied to them. Their Lordships have had an opportunity of referring to an official copy of the Royal Commission to Sir Thomas Brisbane, under the Great Seal, dated the 24th of January, 1821. It recites the previous commission to Governor Macquarie of the 8th of May, 1809, defines the limits and boundaries of the territory, and confers on the Governor authority and jurisdiction which may be described as royal, including full powers to make grants of lands, tenements, and hereditaments, but it gives no indication of the law which was to be in force in the Colony.

Their Lordships have recently had occasion to consider, in *Jex* v. *McKinney and Others* (1), the authorities bearing upon the question of the suitability of English law to colonial circum-

(1) Ante, p. 77.

stances. That case differed from the present in this respect, that there the law of England was introduced into the Colony by statute, and not by the silent operation of constitutional principles; but its introduction was qualified by words which excluded the application of laws prevailing here which were unsuitable in their nature to the needs of the Colony.

The rule against perpetuities, as applied to persons and gifts of a private character, though not finally settled in all its details, until a comparatively recent date, is, in its principle, an important feature of the common law of England. To that extent it appears to be founded upon plain considerations of policy, and, in some shape or other, finds a place in most, if not in all, complete systems of jurisprudence. Their Lordships see no reason to suppose that the rule, so limited, is not required in New South Wales by the same considerations which have led to its introduction here, or that its operation in that Colony would be less beneficial than in England. The learned judges of the Supreme Court of the Colony, in deciding this case, proceeded on the assumption that the rule applies there as between subject and subject; and their Lordships are of opinion that the assumption is well founded.

Assuming next (but for the purposes of this argument only) that the rule has, in England, been extended to the Crown, its suitability, when so applied, to the necessities of a young Colony raises a very different question. The object of the Government, in giving off public lands to settlers, is not so much to dispose of the land to pecuniary profit as to attract other colonists. It is simply impossible to foresee what land will be required for public uses before the immigrants arrive who are to constitute the public. Their prospective wants can only be provided for in two ways, either by reserving from settlement portions of land, which may prove to be useless for the purpose for which they are reserved, or by making grants of land in settlement, retaining the right to resume such parts as may be found necessary for the uses of an increased population. To adopt the first of these methods might tend to defeat the very objects which it is the duty of a colonial governor to promote; and a rule which rests on considerations of public policy cannot be said to be reason-

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ably applied when its application may probably lead to that result.

Their Lordships have, accordingly, come to the conclusion that, assuming the Crown to be affected by the rule against perpetuities in England, it was nevertheless inapplicable, in the year 1823, to Crown grants of land in the Colony of New South Wales, or to reservations or defeasances in such grants to take effect on some contingency more or less remote, and only when necessary for the public good.

The decision in the Courts below, with the result of which their Lordships entirely agree, went very much on the case of *Lord* v. *Commissioners for Sydney* (1), and if the decision in that case had been directly applicable it would have been one which their Lordships would have been bound to follow. But though the decision is not directly in point, its circumstances throw some light upon the present question. It was an action for compensation under the Sydney Water Act of 1853. The compensation sought and awarded was in respect of putting in force a reservation under a grant of 1810, made by Governor Macquarie in terms identical with the grant of 1823, and the Water Act seems fully to recognise the validity of such reservations.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and this appeal dismissed. The appellant must pay the costs of the appeal.

Solicitors for appellant: *Rowcliffes, Rawle & Co.*
Solicitor for respondent: *Randolph C. Want.*

(1) 12 Moore's P. C. Cases, 473.

[PRIVY COUNCIL.]

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA . . . . . } APPELLANT;

AND

THE ATTORNEY-GENERAL OF CANADA. RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

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1888
Nov. 22, 23.
1889
April 3.

Law of Canada—British North America Act, 1867, *s.* 109—*Rights of the Province to the Precious Metals—Conveyance of "Public Lands"—Construction.*

Held, that a conveyance by the Province of British Columbia to the Dominion of "public lands," being in substance an assignment of its right to appropriate the territorial revenues arising therefrom, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon, and under such lands are not incidents of the land but belong to the Crown, and, under sect. 109 of the British North America Act of 1867, beneficially to the Province, and an intention to transfer them must be expressed or necessarily implied.

APPEAL from a judgment of the Supreme Court of Canada (Dec. 13, 1887), confirming the judgment of a judge of the Exchequer Court of Canada upon a case stated under "The Supreme and Exchequer Court Act," and Columbian Act, 45 Vict. c. 2.

The case stated was as follows:—"The Attorney-General of Canada alleges, and the Attorney-General of British Columbia denies, that the precious metals in, upon, and under the public lands mentioned in sect. 2 of the Columbian Act 47 Vict. c. 14, are vested in the Crown as represented by the Government of Canada, and not as represented by the Government of British Columbia."

The way in which the controversy arose is stated in the judgments of their Lordships. The report of the case in the Supreme Court will be found in 14 Sup. Ct. (Canada) p. 345.

The Supreme Court decided by three judges out of five in favour of the respondent.

* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and LORD MACNAGHTEN.

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Ritchie, C.J., held that the principle applicable to the case of grants of land from the Crown to a subject was not applicable to the present case, which was not the case of a grant or conveyance at all but of a statutory transfer to the Dominion by the Province of British Columbia of the right of that Province to the public lands in question, the title to the lands remaining throughout in the Crown. He held that the expression "public lands" was sufficient to pass the interest in question. He also relied upon the wording of a British Columbia minute of the 10th of February, 1883, as shewing how the transactions in question were understood by the Provincial Government.

Gwynne, J. (Taschereau, J., consenting), agreed with the Chief Justice, and relied upon the fact that nearly the whole of the belt of territory in question consists of mountain lands which are of no value for agricultural or other surface purposes, and that the value for surface purposes of such small portion thereof as consists of land in the valleys of the mountain streams is reduced to a minimum by reason of the large powers conferred upon the mining owner as against the surface owner by the Mining Acts of British Columbia, which Acts enable the former to enter upon the lands of the latter, and to dispossess him upon payment of compensation, and to appropriate the water from the mountain streams, and consequently that unless the precious metals pass to the Dominion the cession is illusory and of no value.

Fournier, J., held that the transfer under which the lands in question passed to the Dominion was in effect a contract between the Queen as chief of the Executive Government of the Province, and the Queen as chief of the Executive Government of the Dominion, whom for this purpose he held to be in effect different legal persons, and that to this contract the principles enumerated in the *Earl of Northumberland's Case* (1) applied. He considered that the words "public lands" in the British Columbia Act, 47 Vict. c. 14, did not transfer the right to the precious metals on or under such lands, that in sect. 109 of the British North America Act, 1867, the words "mines and minerals" are specified in addition to lands, and he drew a distinction in this respect

(1) 1 Plowd. 310.

between those words in the 109th section of that Act, and the words "public lands" in the 91st section of the same Act, which latter words he held were used in a sense exclusive of mines and minerals. He was also of opinion that the legislative control over the lands in question would pass to the Dominion. Henry, J., based his judgment upon a previous decision of his own, in a case of *The Queen* v. *Farwell* (1) in 1886, in which he decided that the title to the lands in question was not vested in the Queen.

Sir *Horace Davey*, Q.C., *Jeune*, Q.C., and *Clay*, for the appellant, contended that this decision was erroneous. As to the prerogative right of the Crown to the precious metals found in mines reference was made to *In re Earl of Northumberland's Mines* (2), and to *Woolley* v. *Attorney-General of Victoria* (3). It is a rule of law, settled by those authorities, that this prerogative right will not pass under a grant of land by the Crown unless by apt and precise words the intention of the Crown that it should pass is expressed. By the British North America Act, 1867, sect. 109 and sect. 10 of the Order in Council (May 16, 1871), by which the Province of British Columbia was admitted into union with the Dominion of Canada, that prerogative right remained vested in the Crown on behalf of the Province. Reference was made to British Columbian Acts 43 Vict. No. 11, and 47 Vict. c. 14. No transfer of prerogative right was effected thereby, nor by the grant in question made by the Province to the Dominion Government. That grant was in reality a grant of land to the Canadian Pacific Railway Company to aid in the construction of the railway. The lands in reference to which this question has arisen have not ceased to be part of the Province and subject to provincial legislation. Mining for gold and silver in these lands is regulated by the Provincial Gold Mining Ordinance, 1867, sects. 4 and 15, and by the Mineral Act, 1884. Under those Acts miners must be licensed by certificate of the provincial authorities. See also the Land Act, 1875, sects. 80 and 81, and Land Act, 1884, sects. 64, 65, which

(1) This judgment will be found, together with the judgments of the Supreme Court which reversed it, in 14 Sup. Ct. (Canada) 392.

(2) 1 Plowd. 310.

(3) 2 App. Cas. 163.

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reserve to such miners the right to enter on lands alienated by the Crown and search therein for precious metals. This is inconsistent with an intention to transfer to the Dominion the prerogative rights of the Crown to precious metals found in provincial territory. The claim of the Dominion is in violation of British North America Act, 1867, sect. 109: see *Attorney-General of Ontario* v. *Mercer* (1).

Rigby, Q.C., *Sedgwick*, Q.C. (Canada), and *Gore*, for the respondent, contended that the principle established by the cases in Plowden's Reports and 2 App. Cas. did not apply. This is not the case of a grant of land from the Crown to a subject. No question is involved of a grant from the Crown nor any question as between the Crown and a subject. The title to the belt of territory in question remained in the Crown after the cession by the Province to the Dominion, just the same as before the cession. The cession was made by the Queen as represented by the Province to the Queen as represented by the Dominion. Under these circumstances the expression "lands" primâ facie includes the prerogative right of the Crown to the precious metals upon and under the soil of such property. Such a right is an ordinary incident to the title to the soil on the part of the Crown. "Public lands" in sect. 92 of British North America Act, 1867, do not exclude mines and minerals upon such lands. If mines and minerals were excluded therefrom the legislative control over the sale and management thereof in the Province would not belong to the Province under sect. 92, but would be vested in the Dominion under sect. 91. This would be contrary to the case on both sides, as shewn by the whole course of provincial and dominion legislation since 1867. "Public lands" in sect. 92 are equivalent to the several descriptions of landed property specified in sect. 109, that is, include the precious metals. The same expression has the same meaning when used in art. 11 of the Terms of Union and in sect. 2 of British Columbian Act, 47 Vict. c. 14. Consequently the right to the precious metals in question passed to the Dominion Government, and is no longer vested in the Province.

(1) 8 App. Cas. 767.

Sir *Horace Davey*, Q.C., replied.

The judgment of their Lordships was delivered by

LORD WATSON :—

The question involved in this appeal is one of considerable interest to the parties, but it will be found to lie within a very narrow compass, when the facts, as to which there is no dispute, are explained.

By an Order in Council, dated the 16th of May, 1871, Her Majesty, in pursuance of the enactments of sect. 146 of the British North America Act, 1867, was pleased to ordain that the Province of British Columbia should, from the 29th day of July following, be admitted into and form part of the Dominion of Canada, subject to the provisions of that Act, and to certain Articles of Union which had been duly sanctioned by the parliaments of Canada and by the legislature of British Columbia. The eleventh of the Articles of Union is in these terms:—

"11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the union.

"And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-West Territories and the Province of Manitoba. Provided, that the quantity of land which may be held under pre-emption right, or by Crown grant, within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous

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public lands; and, provided further, that until the commencement within two years, as aforesaid, from the date of the union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land so to be conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the union, the sum of $100,000 per annum, in half-yearly payments in advance."

After the union, owing to engineering and other difficulties, there was considerable delay in constructing the line of railway through British Columbia. Various differences arose between the two Governments, and these were ultimately settled, in the year 1883, by a provisional agreement, which was subsequently ratified by the respective legislatures of Canada and the Province. Part of the agreement had reference to the 11th article of Union, which it modified to the following extent. The Government of British Columbia agreed to convey to the Government of the Dominion, as therein provided, the public lands along the railway, wherever it might be finally located, to a width of twenty miles on either side of the line, and, in addition, to convey to the Dominion Government three and a half millions of acres of land in the Peace River District, in one rectangular block, east of the Rocky Mountains, and joining the North-West Territory of Canada. On the other hand, the Dominion Government undertook, with all convenient speed, to offer for sale the lands within the railway belt, on liberal terms, to actual settlers; and also to give to persons who had squatted on these lands a prior right of purchasing the lands improved, at the rates charged to settlers generally. In accordance with this agreement, the lands forming the railway belt were granted to the Dominion Government, in terms of the 11th Article of Union, by an Act of the legislature of British Columbia, 47 Vict. c. 14, s. 2.

In 1884, a controversy arose between the Dominion and the Provincial Government in regard to the gold, which had then been found to exist in considerable quantities within the forty-

mile belt. With the view of judicially ascertaining which of them was entitled to it, a special case was adjusted, commendable for its brevity, which simply states the issue to be, whether the precious metals in, upon, and under the lands within the forty-mile belt are vested in the Crown, as represented by the Government of Canada, or as represented by the Government of British Columbia? The case was first presented to Fournier, J., in the Exchequer Court of Canada, who, without hearing parties on the merits, gave a formal judgment in favour of the Dominion. On appeal, his judgment was, after a full hearing, affirmed by a majority of the Supreme Court of Canada, consisting of Sir William Ritchie, C.J., with Taschereau and Gwynne, JJ., the dissentient members of the Court being Fournier and Henry, JJ.

BENGAL SECRETARIAT LIBRARY.

It was not disputed, in the arguments addressed to this Board, that the question raised in the special case must be decided according to the principles of the law of England, which, "so far as not from local circumstances inapplicable," was extended to all parts of the Colony of British Columbia by the English Law Ordinance, 1867.

Whether the precious metals are or are not to be held as included in the grant to the Dominion Government, must depend upon the meaning to be attributed to the words "public lands" in the 11th Article of Union. The Act 47 Vict. c. 14, s. 2, which was passed in fulfilment of the obligation imposed upon the Province by that article and the agreement of 1883, defines the area of the lands, but it throws no additional light upon the nature and extent of the interest which was intended to pass to the Dominion. The obligation is to "convey" the lands, and the Act purports to "grant" them, neither expression being strictly appropriate, though sufficiently intelligible for all practical purposes. The title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province, before its admission into the federal union. Leaving the precious metals out of view for the present, it seems clear that the only "conveyance" contemplated was a

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transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues. It was neither intended that the lands should be taken out of the Province, nor that the Dominion Government should occupy the position of a freeholder within the Province. The object of the Dominion Government was to recoup the cost of constructing the railway by selling the land to settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position as if it had been settled by the Provincial Government in the ordinary course of its administration. That was apparently the consideration which led to the insertion, in the agreement of 1883, of the condition that the Government of Canada should offer the land for sale, on liberal terms, with all convenient speed.

According to the law of England, gold and silver mines, until they have been aptly severed from the title of the Crown, and vested in a subject, are not regarded as partes soli, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land, and the baser metals which it contains, stands upon a different title from that to which its right to the precious metals must be ascribed. In the *Mines Case* (1) all the justices and barons agreed that, in the case of the baser metals, no prerogative is given to the Crown; whereas "all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore." In British Columbia the right to public lands, and the right to precious metals in all provincial lands, whether public or private, still rest upon titles as distinct as if the Crown had never parted with its beneficial interests; and the Crown assigned these beneficial interests to the Government of the Province, in order that they might be appropriated to the same state purposes to which they would have been applicable if they had remained in the possession of the Crown. Although the Provincial Government has now the disposal of all revenues derived from prerogative rights connected with land or minerals

(1) 1 Plowd. 336, 336 a.

in British Columbia, these revenues differ in legal quality from the ordinary territorial revenues of the Crown. It therefore appears to their Lordships that a conveyance by the Province of "public lands," which is, in substance, an assignment of its right to appropriate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.

The grounds upon which the majority of the learned judges of the Supreme Court decided in favour of the Dominion are briefly and forcibly stated in the judgment delivered by Sir William Ritchie, C.J. They were of opinion that the rule of construction which excepts the precious metals from a conveyance of land by the Crown to a subject has no application to the provisions of the 11th Article of Union, which they regarded as a statutory compact between two constitutional governments. The learned Chief Justice said: "This was a statutory arrangement between the Government of the Dominion and the Government of British Columbia, in settlement of a constitutional question between the two Governments, or rather giving effect to and carrying out the constitutional compact under which British Columbia became part and parcel of the Dominion of Canada, and, as a part of that arrangement, the Government of British Columbia relinquished to the Dominion of Canada, as represented by the Governor-General, all right to certain public lands belonging to the Crown, or to the Province of British Columbia, as represented by the Lieutenant-Governor."

If the 11th Article of Union had been an independent treaty between the two Governments, which obviously contemplated the cession by the Province of all its interests in the land forming the railway belt, royal as well as territorial, to the Dominion Government, the conclusion of the Court below would have been inevitable. But their Lordships are unable to regard its provisions in that light. The 11th article does not appear to them to constitute a separate and independent compact. It is part of a general statutory arrangement, of which the leading enactment is, that, on its admission to the Federal Union, British Columbia shall retain all the rights and interests assigned to it by the provisions of the British North America Act, 1867, which govern

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the distribution of provincial property and revenues between the Province and the Dominion; the 11th article being nothing more than an exception from these provisions. The article in question does not profess to deal with jura regia; it merely embodies the terms of a commercial transaction, by which the one Government undertook to make a railway, and the other to give a subsidy, by assigning part of its territorial revenues.

Their Lordships do not think it admits of doubt, and it was not disputed at the bar, that sect. 109 of the British North America Act must now be read as if British Columbia was one of the provinces therein enumerated. With that alteration, it enacts that "all lands, mines, minerals, and royalties," which belonged to British Columbia at the time of the union, shall for the future belong to that Province and not to the Dominion. In order to construe the exception from that enactment, which is created by the 11th Article of Union, it is necessary to ascertain what is comprehended in each of the words of the enumeration, and particularly in the word "royalties." The scope and meaning of that term, as it occurs in sect. 109, underwent careful consideration in the case of *Attorney-General of Ontario* v. *Mercer* (1), which was appealed to this Board by the Dominion Government, in name of the defendant Mercer. In that case their Lordships were of opinion that the mention of "mines and minerals" in the context was not enough to deprive the word "royalties" of what would otherwise have been its proper force (2). The Earl of Selborne, in delivering the judgment of the Board, said (3): "It appears, however, to their Lordships to be a fallacy to assume that because the word 'royalties' in this context would not be regarded as inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated, lands as well as mines and minerals—even as to mines and minerals it here necessarily signifies rights belonging to the Crown jure coronæ."

It is not necessary for the purposes of this appeal to consider

(1) 8 App. Cas. 767. (2) 8 App. Cas. 777. (3) 8 App. Cas. 778.

whether the expression "royalties," as used in sect. 109, includes jura regalia other than those connected with lands, mines, and minerals. *Attorney-General of Ontario* v. *Mercer* (1) is an authority to the effect, that, within the meaning of the clause, the word "royalties" comprehends, at least, all revenues arising from the prerogative rights of the Crown in connection with "lands," "mines," and minerals." The exception created by the 11th Article of Union, from the rights specially assigned to the province by sect. 109, is of "lands" merely. The expression "lands" in that article admittedly carries with it the baser metals, that is to say, "mines" and "minerals," in the sense of sect. 109. Mines and minerals, in that sense, are incidents of land, and, as such, have been invariably granted, in accordance with the uniform course of Provincial legislation, to settlers who purchased land in British Columbia. But jura regalia are not accessories of land; and their Lordships are of opinion that the rights to which the Dominion Government became entitled under the 11th article did not, to any extent, derogate from the Provincial right to "royalties" connected with mines and minerals under sect. 109 of the British North America Act.

Their Lordships do not doubt that the 11th Article of Union might have been so expressed as to shew, by necessary implication, that some or all of the royalties dealt with by sect. 109 were to pass to the Dominion along with the lands constituting the railway belt. But there is not a single expression in the context which is applicable to gold or gold-mining rights. On the other hand, the whole terms of the Articles of Union, as well as of the subsequent Agreement of 1883, appear to their Lordships to point to the conclusion that the high contracting parties were dealing with public lands, in so far as these were available for the ordinary purposes of settlement, and had either excluded gold mines from their arrangements, or had them not in contemplation. It is right, however, to notice that the learned Chief Justice refers to a minute of the Council of British Columbia containing the recommendation of a committee, which was communicated to the Government of Canada, as evidencing an understanding, on the part of the Provincial Government, that mines

(1) 8 App. Cas. 767.

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of gold and other precious metals were to be conveyed along with the belt lands. The passage upon which the learned Chief Justice relies is in these terms:—"That it be one of the conditions that the Dominion Government, in dealing with lands in the Province, shall establish a land system equally as liberal, both as to mining and agricultural industries, as that in force in this Province at the present time, and that no delay shall take place in throwing open the land for settlement." The words "mining and agricultural industries," taken per se, might be of dubious import, because they would not disclose whether gold digging was referred to as one of the mining industries. But these industries are described as an integral part of the "land system;" and when it is considered that, at the date of the report, the system of land settlement in the Province, which included the baser metals, was regulated by special statute, and that gold mines, which were not given off to settlers, were not treated as part of that system, but were the subject of separate legislation, it becomes apparent that the Committee did not make any reference to gold in their recommendation.

Their Lordships are for these reasons of opinion that the judgment appealed from must be reversed, and that it ought to be declared that the precious metals within the railway belt are vested in the Crown, subject to the control and disposal of the Government of British Columbia, and they will humbly advise Her Majesty to that effect. There will be no order as to costs.

Solicitors for appellant: *Hepburn, Son, & Cutliffe.*
Solicitors for respondent: *Bompas, Bischoff, Dodgson, & Coxe.*

[PRIVY COUNCIL.]

HARDING . . . . . DEFENDANT;

AND

HOWELL . . . . . PLAINTIFF.

J. C.*
1889
Feb. 1, 6, 7; March 9.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Administration Act of 1872—*Grant of Administration vests the Title as from the Date of Death—Rights of Husband as his Wife's Administrator in respect of his Voluntary Conveyance to her.*

In an administration suit by the next of kin of the intestate against her husband and administrator, it appeared that certain real estates had vested in the intestate by virtue of certain voluntary conveyances by her husband (which contained covenants for further assurance); that the husband, after the intestate's death, purported to convey the said real estates for valuable consideration, and thereafter insisted upon and obtained in his marital right administration to the deceased; that the alleged conveyance for value was not bonâ fide; that a second conveyance was thereupon made, and consideration again alleged to have been paid:—

Held, that under the Victorian Administration Act of 1872 the effect of the husband's becoming administrator to his wife's estate was that the estate passed to him as from the date of the death, not beneficially, but as trustee of his wife's assets, and under obligation to realize and apply and distribute them according to law. Consequently the conveyance by the husband, if made for value, and so as to defeat the prior settlements, was a breach of trust by him; if not made bonâ fide, it was inoperative. In either view the husband was chargeable with the value of the estates conveyed as part of the assets of the intestate.

APPEAL from a decree of the full Court (July 1, 1886) affirming a decree of the Primary Judge in Equity (April 9, 1885).

The action arose out of a sale which the appellant after the death of his wife made to one Tangye of lands which he, the appellant, had voluntarily conveyed to his wife.

The facts and proceedings are stated in the judgment of their Lordships; and a report of the case in the Court below will be found in 12 Vict. L. R. 538.

* *Present:*—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and LORD MACNAGHTEN.

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Sir *Horace Davey*, Q.C., and *J. Dennistoun Wood*, for the appellant, contended that Molesworth, J., and the full Court were wrong in charging against the appellant the value of the lands in question as part of the assets of the estate for which he was liable as his wife's administrator. It is part of the settled law of the country that a voluntary conveyance may be avoided by the grantor subsequently conveying for valuable consideration: see *Doe* v. *Manning* (1); *Doe* v. *Bottriell* (2). Molesworth, J., also held that a grantor who has defeated a voluntary conveyance by a subsequent bonâ fide sale was liable to be sued on his covenants for further assurance contained in the voluntary conveyance. Howell, however, under that conveyance was not a trustee but a mere releasee to uses, the conveyance being to him to the use of Mrs. Harding. He therefore could recover only nominal damages and Mrs. Harding could not have sued at all. A volunteer, moreover, is not assisted in equity when he has no legal rights; and after her death her administrator could not sue himself. The Full Court considered that the appellant, being administrator, could not sell for his own benefit. But by whomsoever the sale was made, the voluntary conveyance was, it was contended, avoided. Reference was made to *Fletcher* v. *Fletcher* (3). [LORD HOBHOUSE:—If the voluntary conveyance became void, would the covenant survive?] With regard to the second sale, the full Court ought to have directed an inquiry whether it was bonâ fide and for valuable consideration. [LORD WATSON:—May the appellant make sale after sale until there is a good one? LORD MACNAGHTEN referred to *Hales* v. *Cox* (4).] Then as regards the appellant's position as administrator, reference was made to sect. 6 of the Act of 1872. Reference was also made to *Williamson* v. *Codrington* (5); *Pulvertoft* v. *Pulvertoft* (6); *Hervey* v. *Audland* (7), reported under the name of *Ward* v. *Audland* (8). Neither the appellant nor Tangye was requested before action to execute any assurance, and a request made after action would

(1) 9 East, 59.
(2) 5 B. & Ad. 131.
(3) 4 Hare, 67.
(4) 32 Beav. 118.
(5) 1 Ves. Sen. 511.
(6) 18 Ves. 84.
(7) 14 Sim. 531.
(8) 16 M. & W. 862.

not entitle the respondent to recover in the present action for its breach. See *Lapington* v. *Lapington* (1); *Toke* v. *Andrews* (2); *Beddall* v. *Maitland* (3); *Peter* v. *Nicolls* (4); *Evelyn* v. *Templar* (5); *Daking* v. *Whimper* (6); *Townend* v. *Toker* (7).

Rigby, Q.C., and *Eady*, for the respondent, contended that the conveyance of the 8th of February, 1883, was not made bonâ fide and for valuable consideration. The sale was collusive and at an undervalue, and constitutes a devastavit by the administrator. It is either inoperative altogether, or if it takes effect it is a breach of trust for which the appellant is accountable to the estate of his wife to the extent of the full value of the estate conveyed. There is no such absolute right in a settlor to set aside his voluntary conveyance ab initio, as that he could do so under all circumstances regardless of what has happened. Here he had become administrator and trustee of his wife's estate, and he had placed himself in a position in which his duties conflicted with his interests, and his duty to the estate was paramount. Reference was made to *Upton* v. *Bassett* (8); *Kirk* v. *Clark* (9). As to assisting volunteers: *Ellison* v. *Ellison* (10); *Watson* v. *Parker* (11). An administrator or trustee cannot get rid of his obligation by saying that he cannot sue himself; he is accountable in equity for the amount of his indebtedness as part of the assets of the estate, and the liability of an administrator accrues not from the date of taking out administration but from that of the death, the grant of letters relating back to that date. Reference was made to *Ingle* v. *Rickards* (12); *Hales* v. *Cox* (13). As to the effect of appointing a debtor executor, see Williams on Executors, part iii., bk. 3, c. 2, sect. 9, p. 1316.

Sir *H. Davey*, Q.C., replied.

(1) 14 P. D. 21.
(2) 8 Q. B. D. 428.
(3) 17 Ch. D. 174.
(4) Law Rep. 11 Eq. 391.
(5) 2 Brown's Ch. Ca. 147.
(6) 26 Beav. 568.
(7) Law Rep. 1 Ch. 446, 460.
(8) Cro. El. 445.
(9) Prec. in Chan. 275; S. C., 2 Eq. Ca. Abr. 165.
(10) 6 Ves. 656; S. C., W. & T. 6th Ed. vol. i. pp. 291, 298.
(11) 6 Beav. 283, 287.
(12) 28 Beav. 366.
(13) 32 Beav. 118.

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Mar. 9. The judgment of their Lordships was delivered by

LORD FITZGERALD:—

This is an appeal from a decree of the Full Court of the colony of Victoria dismissing the appellant's appeal from the judgment of the Primary Judge in Equity, and affirming the decision of that Judge.

The suit was instituted on the 22nd of September, 1884, by the respondent as plaintiff, against the appellant and Richard Howell as defendants, for administration of the estate of Mary Louisa Harding, deceased, intestate, of which the appellant is administrator, and praying that certain real estate belonging to the intestate, but alleged by the appellant to have been conveyed by him to one Silas George Tangye, might be got in and sold, or that the appellant might be charged with the full value thereof, and for accounts and distribution.

The appellant in his defence denied that the intestate had any real estate, save certain property the subject of a voluntary settlement, which after her death had been avoided by a sale and conveyance for value.

The facts of the case are as follow:—

The appellant had been owner in fee of two estates, known as the Chocolyne and the Devon estates.

By an indenture dated the 4th of December, 1878, and made between the appellant of the first part, the said intestate Mary Louisa Harding (his wife) of the second part, and the respondent of the third part, the appellant, in consideration of £8076 expressed to have been paid to him by the said Mary Louisa Harding, conveyed the Chocolyne estate unto the respondent and his heirs, to hold to him and his heirs to the use of the said Mary Louisa Harding, her heirs and assigns, for ever, as and for her separate estate, and the appellant covenanted with the respondent, his heirs cestui que use and assigns, for title, and that all the said estate might be quietly entered into, held, and enjoyed without interruption or disturbance by the appellant, or by any person claiming through him, and that he, the appellant, his heirs, executors, and administrators, would at all times execute and do all such assurances and acts for further or better assuring

all or any of the said premises unto and to the use of the respondent, his heirs cestui que use, and assigns, as by him or them should be reasonably required.

By a further indenture, dated the 25th of February, 1879, and made between the same parties as the said indenture of the 4th of December, 1878, the appellant, in consideration of £7026, conveyed the Devon estate unto the respondent, his heirs and assigns, to the use of the said Mary Louisa Harding, her heirs and assigns, as separate estate, in like manner and with like covenants.

The form of the conveyances was such that the estates did not remain in the trustee, but passed at once and vested in Mary Louisa Harding.

It was admitted that the two deeds were voluntary deeds, and that the statement in each of a money consideration was untrue.

Mary Louisa Harding died on the 25th of January, 1882, intestate, leaving her husband (appellant) surviving, and two brothers, respondent and Richard Howell, her next of kin.

The respondent and the said Richard Howell were the only persons entitled to share with the appellant in the proceeds of her estates.

The appellant alleged that on the 8th of February, 1883, he conveyed the said Chocolyne and Devon estates, comprised in the conveyances of the 4th of December, 1878, and 23rd of February, 1879, to Silas George Tangye (his nephew) for £7250.

There was some correspondence and considerable delay about taking out administration, but finally, on steps being taken by the respondent to constitute himself administrator, and also by the curator, the appellant insisted on and obtained in his marital right administration to his deceased wife on the 4th of October, 1883.

By an order of the Primary Judge, dated the 4th of December, 1884, it was ordered that the action should stand over, to enable the respondent to make such demands and tenders of conveyance, and do such other acts as might be advised, for the purpose of enforcing fulfilment of the covenants for further assurance contained in the said indentures of the 4th of December, 1878, and 25th of February, 1879, and that the respondent should have

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liberty to amend the statement of claim accordingly. It is not necessary, in the view which their Lordships entertain, to state the proceedings consequent on this order.

The cause was heard before Mr. Justice Molesworth, who held that, assuming the conveyance to be bonâ fide and for value, so as to defeat the voluntary conveyances made in favour of Mrs. Harding, yet the defendant (now appellant) was liable on his covenants, and, by his judgment of the 9th of April, 1885, it was declared that the respondent, as one of the next of kin of the said Mary Louisa Harding, deceased, was entitled to have the value, on the 23rd of December, 1884, of the said Chocolyne and Devon estates charged against the appellant as part of the assets of the intestate for which he was liable as her administrator, and it was ordered that an inquiry should be made what was the value of the said estates on the 23rd December, 1884.

On the 8th of May, 1885, the appellant gave notice of motion on appeal from that judgment to the Full Court, and on that motion the Court, by order dated the 9th of September, 1885, directed that the following issue should be tried before a special jury: "Did Silas George Tangye, in the month of February, 1883, purchase the Chocolyne and Devon Park estates, or either of them, from the defendant Silas Harding bonâ fide and for valuable consideration?"

That issue was tried on the 29th and 30th days of October, 1885, and the jury found that "Silas George Tangye did not, in February, 1883, purchase the Chocolyne and Devon Park estates, or either of them, from the defendant Silas Harding bonâ fide and for valuable consideration."

The cause again came before the Full Court on the finding on the issue, but was not finally disposed of until July, 1886.

The Full Court, in its reasons, after stating the course of the cause up to the finding of the issue, proceeds as follows:—

"We reserved our judgment until after the trial. The jury found in the negative, and it appeared, therefore, primâ facie that one way or the other the administrator was bound to reimburse the intestate's estate to the full value, the only question being at what time the value should be calculated.

"Meantime, however, Harding had prepared a surprise for the

Court. When the hearing of the appeal was resumed, his counsel asked leave to read an affidavit made by him on his own behalf, to the effect that, subsequently to the trial of the issue, he had again conveyed the settled lands to the same nephew, the price named being £8475, or about £1200 in excess of the sum for which he had pretended to sell them before, and that this time the purchase-money had been really paid. Upon this affidavit Mr. A'Beckett pressed the Court to further postpone its final judgment, and to refer it to the Chief Clerk to inquire whether the facts were as the affidavit alleged. Without deciding whether the affidavit can properly be used at this stage, yet in our opinion, even if it can, the defendant, before he obtains the inquiry which he demands, is bound to satisfy the Court that the result might influence our judgment in his favour. Exception might be taken to the affidavit as insufficient, inasmuch as it does not negative the existence of a secret undertaking between Harding and Tangye that the purchase-money is to be repaid to Tangye as soon as the conveyance has served its purpose. But we think it better to deal at once with the point of law on which Mr. A'Beckett relied."

The Court then proceeds to deal with the question of law raised before them and in the Court below, and finally affirms the decision of Mr. Justice Molesworth with the following important observation :—

"It was the duty of Harding as administrator to get in the estate of the intestate. But instead of that, supposing what may well be doubted, that the second sale was genuine and not a sham like the first, he procured the intervention of a third party with the view of depriving the persons entitled in distribution of property which, as administrator, he ought to have secured for them. Having put himself in a position in which his duty conflicted with his interest, he should not, on equitable principles, be permitted to plead that he preferred his interest to his duty."

Their Lordships think it proper to say that although they do not think it necessary to quote in its terms the correspondence between the parties in reference to the administration as set out in the Appendix, it has not escaped their attention, and they

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refer to it as indicating that the delay of about one year and ten months in taking out the grant of administration arose from the interposition of the appellant, and is attributable to him.

On the 4th of October, 1883, administration was taken out by the appellant.

The administration in question was obtained under the provisions of the Victorian Administration Act of 1872.

Sect. 5 provides that the Court shall have jurisdiction to grant probate or letters of administration of the estate of any deceased leaving property, whether real or personal, within the colony of Victoria.

And by sect. 6, on the Court granting probate or administration, all the hereditaments of the deceased person shall vest as from the death of such person in the executor or administrator.

And by sect. 7 it is provided that the real estate of every deceased person shall be assets in the hands of his executor or administrator for the payment of Crown fees and duties, and for the payment of his debts in the ordinary course of administration, with powers to sell, mortgage, and convey to a purchaser.

Sect. 8 declares that in all suits in equity concerning the real estate of a deceased person, the executor or administrator shall represent his real estate, and all persons interested therein.

And by sect. 10, the executor or administrator shall have the same rights and be subject to the same duties with respect to the real estate as executors or administrators had previously been subject to with respect to personal estate.

Sect. 14 provides that, upon the receipt of an office copy of the probate of any will or of any letters of administration, the registrar of titles shall, on an application in writing of the executor or administrator to be registered as proprietor in respect of any land therein described, enter in the register book a memorandum notifying the appointment of such executor or administrator, and the day of the death of the proprietor when the same can be ascertained, and upon such entry being made such executor or administrator shall become the transferee, and be deemed to be the proprietor of the estate or interest of the deceased proprietor in such land, and shall hold the same under such equities as the

deceased held the same, but for the purpose of any dealings with such land every such executor or administrator shall be deemed to be the absolute proprietor thereof.

Sect. 26 provides that every person to whom a grant of administration shall be made shall previous to the issue of such administration execute a bond to the Chief Justice of the said Court, with two sureties conditioned for duly collecting, getting in, and administering the real and personal estate of the deceased.

Their Lordships observe that the administrator thus takes the real estate of the intestate from the day of the death of the deceased in the fullest manner with statutable powers and duties for its realization and distribution. It is not controverted that according to the statute law of Victoria the duty of the administrator is to realize the whole estate, whether arising from personal or from real property, and after the payment of debts and other liabilities, to distribute the surplus amongst the next of kin.

Upon the argument in support of this appeal much learning was expended on the overreaching effect of the Statute of 27th Elizabeth in favour of a bonâ fide purchaser for value.

Their Lordships do not intend in the least to question the principle which governs the construction and effect of that statute as now long established by decided cases. It has been over and again said that "so many titles stand on it that it must not be shaken," and in that their Lordships concur. They do not intend to convey that up to the 4th of October, 1883, there was anything to restrain the grantor, in these voluntary settlements, from making a bonâ fide sale to a purchaser for value in order to overreach and defeat them, save the liability which he might incur to the representative of his deceased wife on the covenants contained in the settlements.

A very able argument was also addressed to their Lordships in relation to the liability, if any, arising on these covenants. It was pointed out that these covenants could not nor could any of them be enforced at law. The trustee, it was said, could not sue as he was a mere releasee to uses, the right to sue on the covenants passed with the estate to his cestui que use, and the appellant administrator could not at law sue himself.

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It was further urged that the covenant not being capable of being enforced at law, it created but an imperfect obligation to which equity would not give effect in favour of a volunteer. It was urged also for the appellant that the case raised but two questions:—

1. Could the respondent enforce the covenants as against the appellant?

2. Did the second sale and conveyance to Tangye destroy the voluntary settlements?

Their Lordships pass by these questions for the present to consider another and higher one referred to in the judgment of the Full Court below, and rather imperfectly discussed here.

The two estates passed under the voluntary settlements to Mrs. Harding, and continued in her to her death, and on the happening of that event still continued to be part of her assets, although liable to be defeated by a purchaser for value, in whose favour the law would have raised a legal presumption of fraud in the prior voluntary settlements.

The abortive attempt of the 8th of February, 1883, has been disposed of by the finding on the issue, and their Lordships must consider the conveyance of that date to Tangye as having had no operation and passing no estate to him. Up to the time of the grant of administration to the appellant, if a curator had been appointed, he could at once have sold, and would have been bound to do so, and a sale by him and conveyance to the purchaser, or a sale and conveyance under the order of the Court, would have put an end to the power of the settlor to defeat his settlements by a sale to a purchaser for value.

The appellant elected to take out administration. His marital right to do so, in preference to all others, does not admit of question. Administration was not nor could it be forced on him. He insisted on his civil right: see *Ognell's Case* (1), and *Johns* v. *Rowe* (2). What then followed? The estate passed to him, not beneficially, but as a trustee of his wife's assets, and under obligation to realize and apply and distribute them according to law. That was the position of the appellant when this suit was instituted,—when the Primary Judge pronounced his decree,—and

(1) 4th Reports, 48 b. (2) Croke's Reports, vol. iv. p. 106.

when the appeal came to be heard in the full Colonial Court. The second alleged conveyance to Tangye does not seem to have been properly before the Full Court, nor, if it had been, would it weaken the position of the respondent, or afford the appellant any protection.

If it was not a bonâ fide sale and conveyance for value, it had no operation to defeat the prior settlements, and the administrator is chargeable with the value of those estates as part of the assets of his intestate.

If, on the other hand, it was a sale and conveyance by the settlor to a purchaser for value, so as to defeat the settlements, then it was on the part of the administrator a breach of the trust which he had accepted and the duty he had undertaken. A Court of Equity will compel him to make compensation for that breach of trust and of duty to the extent pointed out by Mr. Justice Molesworth.

The view which their Lordships thus express render it unnecessary for them to deal with other questions raised in the argument.

Their Lordships are of opinion that the decision of Mr. Justice Molesworth, affirmed by the full Court, was, in its results, substantially correct, and ought to be affirmed, and the appeal dismissed, and they will so humbly advise Her Majesty. The appellant must pay the costs of the appeal.

Solicitor for appellant: *J. Harwood.*

Solicitors for respondent: *Stanley & Woodhouse.*

[PRIVY COUNCIL.]

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May 9.

AUSTRALIAN STEAM NAVIGATION COMPANY, OWNERS OF S.S. "VICTORIA" . . } PLAINTIFFS;

AND

WILLIAM HOWARD SMITH & SONS, OWNERS OF S.S. "KEILAWARRA." . . } RESPONDENTS

(CONSOLIDATED APPEALS.)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Amendment of Rule Nisi refused—Discretion of Court.

Where at the trial both parties treated an issue as one which should be decided by the judge and not by the jury, and the appellants afterwards obtained a rule nisi for a new trial on the ground that the judge had decided it wrongly:—

Held, that the Court below exercised a right discretion in refusing to amend the rule nisi by stating that the judge should have left such issue to the jury.

APPEAL from two orders of the Supreme Court (Aug. 5, 1885) discharging two rules nisi for new trials in two actions, one of which had been brought by the appellants and the other by the respondents.

They arose out of a collision which had taken place on the night of the 18th of December, 1883, between the *Victoria* and the *Keilawarra*.

A verdict was found for the respondents in the first action and in the second for £2574, the agreed amount of damages.

The appellants contended that the collision occurred in the outer or No. 6 cutting of the Brisbane river, being a narrow channel within the meaning of the Queensland Navigation Act, 1876. The respondents contended that the collision occurred between the two cuttings No. 5 and No. 6 of the said river and not in a narrow channel within the meaning of the Act. The appellants, however, contended that if the collision did occur between the said cuttings the place of collision was a narrow channel within the meaning of the Act.

* *Present*:—LORD WATSON, LORD BRAMWELL, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

The Chief Justice directed the jury that the space between the two channels was not a narrow channel within the meaning of the 7th regulation of the Queensland Regulations for the Ports and Harbours.

On the 4th of November, 1884, a rule nisi for a new trial in each of the said actions was obtained upon the ground that the Chief Justice should have directed the jury that the space between the outer and inner cuttings was a narrow channel within the meaning of the Queensland Navigation Act, 1876, and of the rules and regulations made thereunder, and that therefore the *Keilawarra* having omitted to allow the *Victoria* to pass through the said narrow channel first, as prescribed thereby, should be deemed in fault.

On the 5th of August, 1885, the rule nisi in each of the said actions came on for argument, and counsel for the appellant asked that each of the said rules might be amended by stating that his Honour ought to have left it to the jury to say whether the place in question was or was not a narrow channel.

The Court considered that the proposed amendment would change the rule nisi altogether and substitute a question that was not raised at the trial, and accordingly refused to allow the said amendment and gave judgment discharging the said rules.

Cohen, Q.C., and *Walton*, for the appellants.

The Attorney-General (*Sir R. E. Webster*), *Barnes*, Q.C., and *Hurst*, for the respondents.

The judgment of their Lordships was delivered by

LORD BRAMWELL:—

Their Lordships are of opinion that it is impossible for these appeals to be maintained on the main ground put forward by the appellants. At the trial the appellants and the respondents each treated the question of whether this was a narrow channel as one to be decided by the judge. Whether they were right or wrong in that is a matter upon which their Lordships express no opinion at the present moment, but they both did, not by any agreement between them, treat it as a question to be decided by the judge, and the judge did decide it, and decided it in favour of the respondents. An application was made for a new trial, not on

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the ground that it was not a question for the judge, but that the judge had decided it wrongly. That being the condition of things, there was a rule for a new trial, and when it came on to be heard the learned counsel for the appellants declared that he could not maintain his rule unless it were amended, and upon amendment being refused he declined to argue it, and accordingly it was discharged. It is impossible that there can be any appeal from a decision so acquiesced in. But that does not decide this matter entirely, for Mr. Cohen says, and it was said in the Court below, that there ought to have been an amendment. Their Lordships are strong advocates for amendment whenever it can be done without injustice to the other side, and even where they have been put to certain expense and delay, yet if they can be compensated for that in any way it seems to their Lordships that an amendment ought to be allowed for the purpose of raising the real question between the parties. But the Court appealed from, who had the whole matter before them, thought it right to refuse that amendment, and upon the materials before them their Lordships think that they most properly did so, because their Lordships cannot see that any offer was made of the character described, or that any argument was presented to the Court for the purpose of shewing that there was a good ground for saying that justice, according to the real facts of the case, had not been done. Their Lordships therefore think that the Court below was right in refusing the amendment. In expressing this opinion their Lordships do not say that the channel, the place where the accident is supposed to have taken place, was or was not a narrow channel, nor whether it was properly a question for the judge or jury. On these questions their Lordships express no opinion at all. It is not necessary that they should so, because the Court below, which had those matters under its consideration as much as any other matter in the case, determined that they would not grant the amendment. It is impossible for their Lordships to reverse that exercise of their discretion. The result is that their Lordships will humbly advise Her Majesty that the appeals should be dismissed, and they direct that they be dismissed with costs.

Solicitors for appellants: *Field, Roscoe & Co.*
Solicitors for respondents: *Fowler, Perks, Hopkinson & Co.*

[PRIVY COUNCIL.]

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May 10, 11, 21.

THE AUSTRALASIAN STEAM NAVIGATION COMPANY, OWNERS OF S.S. "BIRKSGATE" . . . . . APPELLANTS;

AND

WILLIAM HOWARD SMITH & SONS, LIMITED, OWNERS OF S.S. "BARRABOOL" . . . . . RESPONDENTS.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Procedure—Cross Actions tried separately—Contradictory Verdicts—Motion for New Trial.

Where cross actions involving the same questions of law and fact are separately tried with the result that contradictory verdicts are obtained, if the evidence at each trial is so fairly balanced that a jury might reasonably find either way, both cases ought to be tried again, not separately, but together. The Court in such a case can neither be called upon to exercise the functions of a jury or to issue contradictory decrees:—

Held, however, in this case that one of the verdicts should be set aside as against the weight of evidence.

APPEAL from an order of the Supreme Court (Aug. 17, 1886) making absolute a rule nisi for a new trial in the action of the appellants above mentioned, and discharging a rule nisi to the like effect in the respondents' cross action.

The facts are stated in the judgment of their Lordships.

Cohen, Q.C., and *Walton*, for the Appellants.

The Attorney-General (Sir *R. E. Webster*), *Barnes*, Q.C., and *Hurst*, for the Respondents.

* *Present*:—THE EARL OF SELBORNE, LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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AUSTRAL-ASIAN STEAM NAVIGATION COMPANY v. SMITH & SONS.

May 21. The judgment of their Lordships was delivered by

LORD WATSON:—

These are cross actions brought on the common law side of the Supreme Court of New South Wales by the owners of the steamships *Birksgate* and *Barrabool*, in respect of a collision between these vessels, which occurred within the limits of the harbour of Port Jackson on the night of the 9th of August, 1883, occasioning considerable damage to both. It is unfortunate that, although the parties, the questions of fact and law involved, and the evidence available, were the same in each case, yet there were separate trials. The result was that, in the action at the instance of the owners of the *Birksgate*, a jury found that the collision was wholly attributable to the fault of the *Barrabool*; and a month later another jury, in the counter action at the instance of the owners of the *Barrabool*, found that the *Birksgate* alone was to blame. The late Chief Justice Martin, who presided at the first trial, and Windeyer, J., who presided at the second, each approved of the verdict obtained before him.

Rules nisi for new trials were granted to the defendants in both cases, and were disposed of by a Court consisting of Faucett, Windeyer, and Innes, JJ. These learned judges were all agreed that the rule, in the second case, ought to be discharged. As to the first, there was much difference of opinion. Innes, J., seems to have held that each verdict ought to be treated as if the two cases were unconnected with each other, and that both verdicts, though contradictory, ought to be sustained, unless one or other of them was such as a jury could not honestly and reasonably find; and being of opinion that the verdict in favour of the *Birksgate* was not of that character, he held that neither verdict could be set aside. On the other hand, Faucett and Windeyer, JJ., whilst agreeing that the verdict in the first case ought to be set aside, and a new trial allowed, appear to have come to that conclusion upon somewhat different grounds. Faucett, J., considered the rule in the first case "without reference to the verdict in the cross action." Windeyer, J., thus states the view which he entertained: "Where a single trial has taken place, the rule that the Court will not interfere unless there are 'sound and sufficient grounds for shewing that the jury came to an erroneous conclu-

sion, or that they came to their conclusion under a mistaken direction from the Judge,' as the Privy Council held in the late case of *Brown* v. *McElhone*, is well established. But where, as in this case, two verdicts have been given, one of which must be wrong if the other is right, the Court must have power to say, looking at the whole of the facts, where the truth more probably lies." Following out that view, the learned judge first examines the evidence led at the trial before himself, and then proceeds to apply the inferences which he derives from it to the evidence adduced at the first trial.

The owners of the *Birksgate* have appealed against both judgments. In the arguments addressed to this Board their counsel admitted that they could not successfully impeach the verdict in the second case, if it were tested by the usual rules applicable in the case of a single trial. But they maintained that both verdicts ought to be subjected to the same test, and that it was incompetent to ascertain the reasonableness of the findings of the jury in the first case, by evidence which was submitted not to them, but to a different tribunal. They argued that upon the evidence before the first jury their verdict was one which they might honestly and reasonably return, and one which no Court of Law would disturb if it stood alone; and in these circumstances they submitted that, the two verdicts being equally plausible, justice could best be done by setting both aside, and remitting the cross actions for new trial before the same jury. The argument addressed to us has accordingly been confined to the question, whether the verdict obtained by the appellants was or was not against the evidence?

In cases like the present, it appears to their Lordships that the fact of opposite verdicts having been found by two different juries does not devolve upon the Court the duty of exercising the functions of a jury, and of deciding the actions upon their merits. It also appears to them that the declinature of the parties to submit the decision of their counter-claims to the same jury ought not to impose upon the Court the necessity of issuing two decrees which are absolutely self-contradictory, where that course can be avoided. The parties may, no doubt, acquiesce in both verdicts, and in that case judicial effect must be given to them.

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But where, as here, new trials are moved for in both actions, the Court has the opportunity of doing complete justice between the parties. When the evidence led in each is so fairly balanced that a jury might reasonably find either way, their Lordships are of opinion that both cases ought to be tried again, not separately, but together. If, on the other hand, the verdict in one action is warranted by the evidence, and in the other is "against evidence," in the ordinary sense of the term, their Lordships see no reason why the one should not be allowed to stand, and the other be set aside. In their opinion, the real question raised by these appeals is, whether the verdict returned at the first trial was, as the Appellants maintain, such as the jury might reasonably find upon the evidence before them?

In the view which their Lordships take of that question, it is not necessary to enter into minute details. The harbour of Port Jackson is of considerable extent, the distance from its entrance to Sydney being about seven miles. About a mile and a half from the entrance, which is on the east, there is a group of sandbanks called the Sow and Pigs, which divides the waterway into two channels, the east and west, the latter being the more open, and on that account chiefly used by ships entering and leaving the port. The course of an inward-bound ship, on entering the west channel, is in a southerly direction until she passes through it, and afterwards reaches Bradley's Point, the end of a long promontory which juts into the harbour, from the north. After rounding Bradley's Point her course is nearly due west until she has Fort Denison upon her port beam. The distance from Bradley's Point to Fort Denison is a little under, and from Bradley's Point to the south end of the west channel a little over a mile. On the night of the 9th of August, 1883, the *Birksgate* was going out and the *Barrabool* was coming in, and they came into collision, according to the evidence on both sides, rather more than three ships'-lengths, or from 250 to 300 yards off Bradley's Point. The *Birksgate* was struck upon her starboard bow, which was turned in the direction of the land, and she was immediately beached upon the west corner of the point.

The account given by the master of the *Birksgate*, who was on

the bridge, and in charge of her navigation, is as follows. He passed Fort Denison on his starboard side, and kept on a course nearly due east until he cleared Bradley's Point, when he starboarded about four points, and having rounded the Point, steadied on a straight course for the west channel. He then, and not till then, saw the white and green lights of the *Barrabool* upon his starboard bow, at a distance which he judged to be about three quarters of a mile, when he starboarded a little so as to open his green light to her. The vessels continued to approach on these safe courses; but when they came near, the *Barrabool* suddenly ported and came into him, shewing her red light just before the collision. That story is in the main corroborated by the other witnesses from the *Birksgate*. There is, as might be expected, some difference of opinion among them as to time and distance; but they all agree in saying that a good look-out was kept on board the *Birksgate*, and that the collision was occasioned by the *Barrabool's* sudden and improper change of helm. According to evidence of the *Barrabool* she had passed the west channel, and was within a quarter of a mile or thereabouts of Bradley's Point, steaming at the rate of ten miles an hour, when the masthead and red lights of the *Birksgate* were seen. She was then slowed to half speed, and her helm put to port, but the *Birksgate* altered her course under a starboard helm, shewed her green light, and crossed the bows of the *Barrabool*, rendering collision inevitable, although the *Barrabool* on observing her change of helm first slowed her engines, and then turned them full speed astern.

The testimony of the two crews is thus in direct conflict, the evidence of the *Birksgate* being that the vessels were approaching on relatively safe courses, green to green, when the *Barrabool* ported; and that of the *Barrabool* that they were approaching red to red, when the *Birksgate* starboarded and occasioned the collision. In that condition of the evidence their Lordships do not think that they would be justified in interfering with the finding of the jury, if there were no test available for ascertaining which set of witnesses told the truth, other than their demeanour in the witness box. But that does not appear to their Lordships to be the only test of credibility which is supplied by the

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circumstances of the present case. There are at least two facts established beyond doubt, which, in their opinion, directly refute a material part of the testimony of the appellant's witnesses, and cast grave suspicion upon the remainder of it.

Assuming the accuracy of the account given by the appellants' witnesses as to the course of their vessel, it is clear that the *Birksgate*, until she was brought round on a starboard helm, was heading across the line (whatever that may have been) on which the *Barrabool* was coming towards Bradley's Point; and also, that for nearly a quarter of a mile before she was brought round the lights of the *Barrabool* must have been broad upon her port bow, and visible to any one on board of her who chose to look in the direction of the west channel, or the Sow and Pigs. Yet the lights of the *Barrabool* were not observed on board the *Birksgate* until after she was starboarded and steadied, although her witnesses all say that she was keeping a good look-out. It is equally clear that if an effective look-out was kept on board the *Barrabool* the first light observed must have been that which her witnesses swear that they saw, namely, the red light of the *Birksgate*.

In the next place, the testimony of the appellants' own witnesses fixes the place of the collision very near indeed to the spot where the master alleges that he steadied after starboarding. According to his own account, when he began to starboard he was about five ships'-length, or 1250 feet off Bradley's Point, and at the time of the collision he was about two ships'-length, or 500 feet, nearer the Point. It is scarcely possible that he could have got his ship into that position without exhibiting his green light to a vessel coming from the west channel; and that being so, he must before the collision have shown the *Barrabool* first his red light and then his green, which is in perfect accordance with the evidence of the respondents. The master of the *Birksgate* says, no doubt, that at the time of the collision he had "just got round Bradley's Head;" but he was referred, on cross-examination, to his evidence before the Marine Board, to the effect that he was at that time "about three ships'-length off Bradley's Head," and the only explanation given was that he did not remember having said so. The third officer and an A.B.

seaman who was beside the look-out corroborated the statement which he had made before the Marine Board; and their testimony is borne out by the fact that the *Birksgate*, which neither stopped nor reversed, was immediately after the collision run ashore at the west corner of Bradley's Point.

These facts, which do not admit of controversy, shew plainly, in the first place, that up to the time when she was headed for the west channel no look-out, or a bad look-out, was kept on board the *Birksgate*. In the second place, taking her witnesses' account of the distance between the two vessels when they did see the lights of the *Barrabool*, and of the time which elapsed between their seeing these lights and the collision, and considering that the *Birksgate* was steaming at the rate of five to seven miles an hour, it is simply impossible to reconcile their statements with the fact that the collision took place close to Bradley's Point. Counsel for the appellants made the observation that the estimates of time and distance formed by the appellants' and respondents' witnesses did not materially differ, but they omitted to notice the fact that these estimates had not the same terminus a quo. The estimates of the *Barrabool* witnesses were made on the footing that they saw the red light of the *Birksgate* (and at the time they could have seen no other) as soon as she drew clear of Bradley's Point, and before she began to round it; whereas the *Birksgate* estimates run from the time when she had steadied on her straight course for the west channel.

In these circumstances their Lordships, who had the assistance of their nautical assessors, have been unable to avoid the conclusion that the testimony given by the appellants' witnesses is inconsistent with the established facts of the case. There cannot have been a good look-out kept by the *Birksgate*, and the collision must have occurred just at the time and place, when and where, the appellants' witnesses allege that they began to approach the *Barrabool*, then at a considerable distance, on safe courses starboard to starboard. Giving due effect to these facts, which do not admit of dispute, the only reasonable inference derivable from the evidence appears to be this, that, in coming round on a starboard helm, in order to lay her course for the west channel, the *Birksgate* starboarded so far as to bring her

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nearer to Bradley's Point, and across the bows of the *Barrabool*, which, until that time, she had negligently failed to see.

For these reasons their Lordships are of opinion that the weight of evidence is in favour of the conclusion that the *Birksgate* was alone to blame for the collision, and that the verdict in the first action must be set aside. They will therefore humbly advise Her Majesty that the judgments appealed from ought to be affirmed. The appellants must pay the costs of these appeals.

Solicitors for appellants: *Field, Roscoe & Co.*
Solicitors for the respondent: *Fowler, Perks, Hopkinson, & Co.*

J. C.*
1888
Dec. 6, 19.

[PRIVY COUNCIL.]

In re TWIDALE'S PETITION.

Admission to practise as an Agent—Rules of 31*st March*, 1870, *sects.* 2, 3.

Under sects. 2 and 3 of the Rules of 31st of March, 1870, only solicitors or others practising in London, or solicitors admitted by the High Courts in India or the corresponding Courts in the Colonies, can be admitted to practise in the Privy Council. The Judicial Committee have no power to extend at their discretion the class of those eligible.

PETITION by R. E. Twidale, a pleader in the High Court at Calcutta, to be admitted as agent to practise in the Privy Council, upon his subscribing the declaration prescribed by the Order of Her Majesty in Council of the 30th of March, 1870, "to be observed by proctors, solicitors, agents, and other persons admitted to practise before Her Majesty's honourable Privy Council."

The 2nd and 3rd of these rules are as follows:—

"2. Every proctor, solicitor, or attorney practising in London, and duly admitted in any of the Courts of Westminster, shall be allowed to subscribe the foregoing declaration, and to practise in the Privy Council upon the production of his certificate for the current year.

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, and SIR RICHARD COUCH.

"3. Persons not being certificated London solicitors, but having been duly admitted to practise as solicitors by the High Courts of Judicature in India, or in the colonies, respectively, may apply by petition to the Lords of the Judicial Committee of the Privy Council for leave to be admitted to practise in the Privy Council; and such persons, if admitted to practise by an order of their Lordships, shall pay annually, on the 15th of November, a fee of five guineas to the fee fund of the Council Office."

Doyne, for the petitioner, contended that it was not the effect of those rules to limit the discretion of the Committee and to confine the class of persons eligible for admission to those who were thereby specially described. There were no negative words in those rules. They were enabling and not disabling. He referred to the case of *In re W. Tayler's Petition.*

1888
Dec. 19.

The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

Since this case was argued their Lordships have considered the matter very carefully, and they have been furnished with a copy of the shorthand notes of the proceedings on Mr. Tayler's petition; and they find with some regret that they are unable to accede to Mr. Twidale's request.

Mr. Twidale is a vakeel of high standing and reputation in the Calcutta High Court, but he had not been admitted as a solicitor anywhere, in England or India. He now applies to be admitted to practise here as an agent, and the question is whether the Orders in Council admit of such an application being granted. No doubt there is some ambiguity about them; because, in general terms, they referred to "proctors, solicitors, or agents." There are four sections of the order relating to the subject, and in the first and fourth of those sections all those terms are mentioned; but the two sections which shewed what is the mode of admission and the classes to be admitted are the second and third; and those only apply either to solicitors or others practising in London, and to solicitors admitted by the High Courts in India or the colonies respectively. The question is whether

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those rules 2 and 3 are exhaustive of the classes to be admitted; or, as was argued at the bar, they only specified what should be done in the case of those two classes, and left an undefined class called "agents," who were to be admitted at the discretion of the Committee. Mr. Tayler's case is exactly in point. Mr. Tayler also was a vakeel of the Calcutta High Court, and he had not been admitted as a solicitor anywhere. He applied for leave to practise at this bar. His counsel, Sir Roundell Palmer (Lord Selborne) put the case very much as Mr. Doyne has done. Lord Cairns, on behalf of the Committee, said in that case, "the qualifications are in the schedule." That means in the Orders, I suppose. It is a mistake of the shorthand writer. "The third appears to be the only one upon which any claim can be made. The third applies to solicitors practising in India." Then Sir Roundell Palmer says, "Yes, I see there are affirmative words which do not embrace this case. I do not perceive that there are any negative words which would exclude it." Well, that is precisely the argument which Mr. Doyne put at the bar here. The answer to this is, "Lord Cairns:—There was an obvious reason for specifying the classes which are here specified. I do not say what may or may not be done hereafter, with regard to the very wide class of vakeels who are under very different jurisdictions, but certainly they are not included at present in the order." That (as would be seen) is exactly in point. Their Lordships collect that the Committee on that occasion, as on this, were by no means disinclined to grant the petition if it were within their power. But it has been expressly decided that it was not within their power; and their Lordships now must follow that decision and refuse the application.

Solicitors for petitioner: *T. L. Wilson & Co.*

[PRIVY COUNCIL.]

THE COLONIAL SECRETARY OF NATAL PLAINTIFF;

AND

CARL BEHRENS . . . . . DEFENDANT.

J. C.*
1889
May 18, 28.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Law of Natal—Lands Clauses Consolidation Law, No. 16 *of* 1872—*Lands taken under Statutory Compulsion—Demand of Transfer from the Owner.*

Under the Natal Lands Clauses Consolidation Law, No. 16 of 1872, there is no power to demand a transfer from the owner of lands taken from him by virtue of a reservation in his Crown grant or under statutory compulsion. If such lands are taken under condition of compensation the owner may at his option execute a transfer, but no action lies to compel him, and such transfer can only be obtained by following the procedure prescribed by the said law of 1872.

APPEAL from a judgment of the Supreme Court (March 17, 1887).

The appellant, as representing the Colonial Government, sued the respondent as general manager of the Natal Land and Colonization Company, Limited, claiming, under the circumstances stated in their Lordships' judgment, the transfer of certain lands taken for railway purposes.

The respondent excepted to the appellant's declaration that no provision was made in the railway laws of the Colony to compel transfer by the owners of lands taken for railway purposes.

The Supreme Court allowed the exception, and held that the law of 1872 did not give the Government the right to maintain the action for transfer, but that in default of the owner transfering the proper course was for the proper officer of the Government to apply to the Court to order the registrar of deeds to transfer the lands, and that the transfer was to be obtained otherwise than by such an action as that before the Court.

* *Present:*—LORD WATSON, LORD BRAMWELL, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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The Attorney-General (*Sir R. E. Webster*), and *J. G. Wood*, for the appellant, contended that this judgment was wrong. The provision in Law No. 16 of 1872, that the Government might enter upon, use, and take lands required for the public undertaking, gave by necessary implication a right to a formal transfer and conveyance of such lands from the owners. No other mode of vesting the lands is provided. It was necessary for the due management and control of the railway, and of preventing trespasses thereon, that the Government should acquire not merely an easement over them but the legal estate in and legal ownership of them. The provision that the registrar of deeds should execute the conveyance shews that a conveyance was contemplated, but does not apply when compensation is not payable. Reference was made to Law No. 16 of 1872, sects. 8, 15, 18, & 47; No. 19 of 1875, and No. 1 of 1881; *Spencer* v. *Metropolitan Board of Works* (1), and *Coverdale* v. *Charlton* (2).

The respondent did not appear.

1888
May 28.

The judgment of their Lordships was delivered by

LORD WATSON:—

This is an ex parte appeal at the instance of the Colonial Secretary of Natal, as representing the Government of the Colony.

It appears that in making grants of Crown lands in Natal the usual but not the invariable practice has been to reserve to the Crown, in the public interest, the right of constructing and maintaining main roads upon the lands alienated. By the Law 19 of 1875, the civil engineer of the Colony is empowered to enter upon and take possession of so much "of any of the Crown lands of this Colony," not exceeding one hundred feet in width, as may be required for main roads; and, for that purpose, the official in question is invested with all the legal rights of the Government with respect to the taking of lands, and raising and carrying away materials for making and repairing main roads, "whether such rights have been created or reserved by express stipulation

(1) 22 Ch. D. 142. (2) 4 Q. B. D. 104.

of condition in any grant of land, or exist in any way or manner whatsoever." It is also enacted that no land or materials upon which any building has been erected shall be taken or raised and carried away without compensation to the proprietor. In the case where land has been granted without reservation, and also in the case where, there being a reservation, the land has been improved by cultivation, irrigation, or otherwise, the civil engineer is authorized to treat with owners "who may think proper to require compensation," for the purchase or hire of the land or materials required; and in the event of failure to agree, provision is made for assessing the amount payable by arbitration.

The Law No. 1 of 1881, which incorporates the provisions of the Colonial "Lands Clauses Consolidation Law, 1872," authorized the Lieutenant Governor and his successors (who are constituted a corporation for the purposes of the Act) to make a line of railway from Pietermaritzburg to Ladysmith. It is declared (sect. 10) that the railways thereby authorized shall, "in respect of all Crown lands heretofore granted by the Government in quit-rent, or freehold, or leasehold tenure, and in or over which the railways, or any part thereof, shall be made, be deemed to be roads, made or to be made, for the public good by order of Government, and accordingly the proprietors of such lands shall not, except in the cases provided in their several title deeds, or deeds of grants for compensation, be entitled to any compensation for the land taken for the purposes of the railways." Provision is made for ascertaining the amount of compensation due in the excepted cases.

For the purpose of constructing the line authorized by the Law of 1881, the colonial authorities took and entered into possession of five parcels of freehold land belonging to the Natal Land and Colonization Company, Limited, two of these parcels being portions of the company's estate in the county of Pietermaritzburg, and the other three, parts of their farm of Fountain Hall, in the county of Weenan. All the land so taken was unimproved. The two parcels situate in Pietermaritzburg, about 1A. 3R. in extent, are of less width than one hundred feet. Of the three situate in county Weenan one parcel of forty-nine acres is within that limit; the others, together about 2A. 4R., are beyond it. There

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is no reservation in the Land Colonization Company's title to their lands in Pietermaritzburg; but their farm of Fountain Hall is held subject to the reserved right of Government to resume any part of it for the public use and benefit, without paying compensation to the proprietor. The company have made no claim for compensation; and primâ facie there do not appear to be grounds for such a claim, unless it be in respect of those portions taken from the farm of Fountain Hall which are outside the hundred feet limit.

The colonial authorities called upon the company to execute a formal transfer of these five parcels of land to the appellant, as representing the Colonial Government of Natal. Upon the refusal of the company to comply with their request, a summons was issued from the Supreme Court of Natal, at the instance of the appellant, against Carl Behrens, in his capacity as general manager and representative of the company, praying for an order upon him to execute the transfer. Under the summons a declaration was filed by the appellant setting forth the facts which, so far as material, have already been noticed, and also stating that the "plaintiff is and always has been ready and willing to pay all costs and fees of survey and transfer." The defendant filed exceptions to the declaration, and after hearing argument upon these, the Chief Justice and Cadiz, J., gave judgment in his favour, absolving him from the instance, with costs.

None of the statutes relating to the powers of the Government to resume Crown lands already granted to a subject, for road or railway purposes, make any reference to the execution of transfers by the owners whose lands are resumed, with the single exception of the Lands Clauses Consolidation Law, No. 16, of 1872. The provisions of that Act are intended to apply, not only to the Colonial Government, but to all private persons and corporations who may obtain special statutory power to take land by compulsion for the purposes of their undertaking. Its enactments with respect to transfers are substantially the same with the analogous provisions of the English Lands Clauses Consolidation Act, 1845. Section 47 of the Colonial Statute enacts that, upon tender to the owner, or deposit, "of the purchase-money or compensation agreed or awarded to be paid in

respect of any lands purchased or taken by the company," the owner shall duly transfer such lands to the company, or as they shall direct; and "in default thereof, or if he fail to adduce a good title to such lands to the satisfaction of the said company, it shall be lawful for the Supreme Court, on the application of the secretary or other proper officer of the company, to order the registrar of deeds to transfer the same, and he is hereby authorized to transfer the same accordingly." Sect. 48 provides that, on the owner's refusal to accept the tender or to grant a transfer, it shall be lawful for the company to deposit the money with the Master of the Supreme Court subject to the control and disposition of the Court. These statutory provisions have no application except in cases where compensation is payable; and it is made a condition precedent of the company's right to a transfer that the compensation due shall not only have been fixed in terms of the statute, but shall either have been tendered or paid into Court. The duty of the owner to transfer is not imperative but optional; and if he refuse, the company's sole remedy is to deposit the money and obtain a transfer from the registrar upon the order of the Court. The only penalty attaching to the owner's refusal is that in the event of its being "wilful," he cannot claim from the company the costs of an application to the Court for payment of the money deposited.

The Attorney-General argued that these provisions sufficiently indicate the intention of the Colonial Legislature that a "company," within the meaning of the law of 1872, shall be entitled to demand a transfer from the owner of all lands taken from him under statutory compulsion, whether compensation be payable or not. That inference appears to their Lordships to be wholly unwarranted. "Expressio unius est exclusio alterius" is a maxim directly applicable to the present case. When careful provisions are made with regard to transfers in one class of transactions only, there can be no presumption that any part of these provisions was meant to extend to a totally different class of transactions. In cases where land is compulsorily acquired on condition of compensation being made, the statute imposes upon the parties the relative positions of vendor and purchaser. In cases where it is

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taken by compulsion, and without compensation, no contractual or quasi contractual relation is established between them; and it is difficult to understand on what principle a proprietor who is forcibly deprived of his land without consideration can be held to incur an obligation to grant a conveyance to the persons who take it. Their Lordships cannot, in the absence of express enactment, or of any enactment which could reasonably suggest such an inference, assume it to have been the intention of the Colonial Legislature, in enacting expressly that a proprietor who has been fully compensated may grant a transfer or not, according to his own option, meant to enact, by implication, that another proprietor who has been deprived of his land without compensation must execute a transfer, and may be ordained to do so under pain of imprisonment for contempt.

Apart from statute, the appellant has, in the opinion of their Lordships, failed to shew that he is entitled to the transfer which he demands upon any considerations of law or equity. He has not shewn, and has scarcely attempted to shew, that the execution of such a transfer is necessary in order to complete his right to the parcels of land of which he has entered into possession. It appears to their Lordships that when the Government of a colony, or, in other words, the Crown, has lawfully resumed possession of Crown lands alienated to a subject by virtue either of a reservation in the original grant, or of legislative authority subsequently obtained, the right of a subject is pro tanto extinguished, and his interest, so far as resumed, reverts to the title of the Crown.

These considerations are sufficient to dispose of this appeal, and make it unnecessary to discuss the different positions of certain of the five parcels with respect to the defendant's possible claims for compensation. Where no compensation is due the appellant has no right to call for a transfer, and if compensation is due in any case, he can only obtain a transfer by following the procedure prescribed in the law of 1872. The judgment appealed from must therefore be affirmed, and their Lordships will humbly advise Her Majesty to that effect.

Solicitors for the appellant: *Sutton & Ommanney.*

[HOUSE OF LORDS.]

WILLIAM DERRY, J. C. WAKEFIELD, M. M. MOORE, J. PETHICK, AND S. J. WILDE . . . . . APPELLANTS;

H. L. (E) 1889 July 1.

AND

SIR HENRY WILLIAM PEEK, BARONET. RESPONDENT.

Action of Deceit—False Representation—Fraud—"Legal Fraud"—Company—Misrepresentation in Prospectus.

In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit.

A special Act incorporating a tramway company provided that the carriages might be moved by animal power, and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by their special Act the company had the right to use steam power instead of horses. The plaintiff took shares on the faith of this statement. The Board of Trade afterwards refused their consent to the use of steam power and the company was wound up. The plaintiff having brought an action of deceit against the directors founded upon the false statement:—

Held, reversing the decision of the Court of Appeal and restoring the decision of Stirling J. (37 Ch. D. 541), that the defendants were not liable, the statement as to steam power having been made by them in the honest belief that it was true.

APPEAL from a decision of the Court of Appeal. The facts are set out at length in the report of the decisions below (1). For the present report the following summary will suffice:—

By a special Act (45 & 46 Vict. c. clix.) the Plymouth, Devonport and District Tramways Company was authorized to make certain tramways,

(1) 37 Ch. D. 541.

By sect. 35 the carriages used on the tramways might be moved by animal power and, with the consent of the Board of Trade, by steam or any mechanical power for fixed periods and subject to the regulations of the Board.

By sect. 34 of the Tramways Act 1870 (33 & 34 Vict. c. 78), which section was incorporated in the special Act, "all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only."

In February 1883 the appellants as directors of the company issued a prospectus containing the following paragraph:—

"One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses."

Soon after the issue of the prospectus the respondent, relying, as he alleged, upon the representations in this paragraph and believing that the company had an absolute right to use steam and other mechanical power, applied for and obtained shares in the company.

The company proceeded to make tramways, but the Board of Trade refused to consent to the use of steam or mechanical power except on certain portions of the tramways.

In the result the company was wound up, and the respondent in 1885 brought an action of deceit against the appellants claiming damages for the fraudulent misrepresentations of the defendants whereby the plaintiff was induced to take shares in the company.

At the trial before Stirling J. the plaintiff and defendants were called as witnesses. The effect given to their evidence in this House will appear from the judgments of noble and learned Lords.

Stirling J. dismissed the action; but that decision was reversed by the Court of Appeal (Cotton L.J., Sir J. Hannen, and Lopes L.J.) who held that the defendants were liable to make good to the plaintiff the loss sustained by his taking the shares,

and ordered an inquiry (1). Against this decision the defendants appealed.

March 28, 29; April 5, 9, 11. Sir *Horace Davey* Q.C. and *Moulton* Q.C. (*M. Muir Mackenzie* with them) for the appellants:—

The law as laid down by the Court of Appeal goes much further than any previous decision and is unsound. To support an action of deceit it always was necessary at common law and still is both there and in Chancery to prove fraud, i.e., that the thing was done fraudulently. Fraud never has been and never will be exhaustively defined, the forms which deceit may take being so many and various. There is a negative characteristic: it must be something which an honest man would not do; not merely what a logical or clear-headed man would not do. However unbusinesslike a man may be he is not fraudulent if he acts honestly. The natural consequences of words or acts must be taken to have been intended, but not so as to impute fraud to honesty. No honest mistake, no mistake not prompted by a dishonest intention, is fraud. The shape of the mistake does not make it more or less a fraud if it is a mistake. Once establish that a man honestly intended to do his duty, the consequences cannot turn his words or acts into a fraud. There may be an obligation to see that no untrue statement is made, but the failure to meet that obligation is not fraud, if there is no dishonest intention. The statement may be inaccurate, yet if the defendants honestly—though mistakenly—believed that it substantially represented the truth, there is no fraud, and an action of deceit will not lie. The decision of the Court of Appeal is that to such a statement the law attaches a meaning which makes it fraudulent. A material misstatement may be a ground for rescinding the contract, but the consequences of fraud and of breach of contract are widely different. In an action for breach of contract the defendant must make good his words. In an action founded on fraud he must bear the whole of the consequences which have been induced by the fraudulent statement, which may be very extensive. The essence of fraud is the tricking a person into the bargain. If the fact that the consent of the Board of Trade

(1) 37 Ch. D. 541, 591.

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was necessary was suppressed by these defendants in order to make the bait more alluring there was fraud. The issue then is one of fact, was there an intention to make the bait more alluring? It is not the carelessness leading to an untrue statement which makes fraud; it is the carelessness whether the statement is untrue or not. It is in this sense that the authorities have held defendants liable for fraud when they have made untrue statements "recklessly." The above propositions are the result of the authorities. The law laid down in the earlier cases is well exemplified by *Taylor* v. *Ashton* (1), where, however, the headnote does not truly represent the effect of the decision, and *Joliffe* v. *Baker* (2). In *Polhill* v. *Walter* (3)—which may be relied on by the respondent—the Court considered that the misrepresentation was made by the defendant *knowing it to be untrue.* The idea that something less than fraud was necessary to found an action of deceit crept in first in Lord Chelmsford's observations in *Western Bank of Scotland* v. *Addie* (4), and was extended by Cotton L.J. in *Weir* v. *Bell* (5), where he treats "recklessly" as if it meant "negligently," whereas it means "indifferent whether the statement be true or false." This confusion has arisen mainly since the Judicature Act, actions of deceit being tried in Chancery by judges who, sitting without juries, have confounded issues of fact with issues of law. Here the Court of Appeal held that an action of deceit lies if the defendant makes an untrue statement, without reasonable ground for believing it to be true, though he did in fact honestly believe it to be true. If that be the law a negligent, improvident, or wrong-headed man is a fraudulent man. A want of reasonable ground may be evidence of fraud, but it is not the same thing as fraud.

As to the facts, Stirling J. found that the defendants believed the misstatement to be true, and that finding ought to be conclusive. The Court of Appeal do not contradict that finding.

The misstatement complained of really meant that the company had obtained the necessary statutory authority to use steam power, without which authority no consents could have given

(1) 11 M. & W. 401.
(2) 11 Q. B. D. 255.
(3) 3 B. & Ad. 114.
(4) Law Rep. 1 H. L. (Sc.) 145, 162.
(5) 3 Ex. D. at p. 242.

authority, because by the Tramways Act 1870 (33 & 34 Vict. c. 78 s. 34) steam power is prohibited except where the special Act authorizes steam power. It may be that the defendants knew the statement was not strictly accurate, but if so they honestly thought that the statement conveyed a substantially accurate representation of the fact, either because they thought it not worth while to encumber the prospectus with the qualifications, or because those qualifications were not present to their minds when they made the statement. In the prospectus reference is made to the special Act, so that any one who consulted the Act could see for himself what the authority was.

Lastly, the plaintiff was no doubt in some degree influenced by the misstatement, but there was no evidence that he would not have taken the shares if the statement had contained the full truth as to the necessary consents being obtained.

Bompas Q.C., and *Byrne* Q.C. (*Patullo* with them) for the respondent:—

The decision of the Court of Appeal is right and for the reasons there given. Directors are liable not only for a false statement which they know to be false, but for a false statement which they ought to have known to be false. This proposition is supported by the obiter dictum of Lord Westbury in *New Brunswick &c. Co.* v. *Conybeare* (1), and by the obiter dicta of the Lords in *Peek* v. *Gurney* (2) as to what the liability of the defendants would have been to original shareholders, and by the judgment of Jessel M.R. in *Smith* v. *Chadwick* (3).

It is not necessary that there should be carelessness whether the statement is true or not: it is enough if there be carelessness or negligence in making the statement. Making an untrue statement without reasonable ground is negligence which will support an action of deceit. In support of the respondent's contention the following authorities are relied on: *Slim* v. *Croucher* (4); *Evans* v. *Bicknell* (5); *Brownlie* v. *Campbell* (6); *Polhill* v. *Walter* (7); *Milne* v. *Marwood* (8); *Denton* v. *Great*

(1) 9 H. L. C. 725, 726.
(2) Law Rep. 6 H. L. 377.
(3) 20 Ch. D. 44.
(4) 1 D. F. & J. 518, 523.
(5) 6 Ves. at p. 183.
(6) 5 App. Cas. 925, 935, 950.
(7) 3 B. & Ad. 114.
(8) 15 C. B. 778, 781.

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Northern Railway Company (1); *Thorn* v. *Bigland* (2); *Smout* v. *Ilbery* (3); *Rawlins* v. *Wickham* (4); *Hallows* v. *Fernie* (5); *Mathias* v. *Yetts* (6); *Smith* v. *Chadwick* (7); *Pasley* v. *Freeman* (8); *Chandelor* v. *Lopus* (9). [LORD HALSBURY L.C. referred to *Haycraft* v. *Cressy* (10).]

But it is not necessary to go the full length of the propositions contended for. Even if the fourth proposition of Lopes L.J. is not law, the appellants are nevertheless liable; for the evidence shews that the statements were made either with the knowledge that they were untrue or with no belief on the subject.

It was stated that it was fully expected that a considerable saving would be effected by the use of steam. In fact the directors had not considered the matter, and when they did so afterwards there was a majority of one only in favour of steam. The effect of the evidence is not the same as to all the directors. As to Derry, the inference is that he never took the trouble to consider whether the statement was true or false. Wakefield and Wilde had complete knowledge but made statements which they knew not to be true at the time, thinking the requisite consents would be given. Pethick's evidence is inconsistent with itself. At one moment he says that he thought the Board of Trade had no right to refuse consent if its reasonable requirements were met, at another that he thought they had an absolute right to refuse. Moore, it must be admitted, stands in a different position, and can only be held liable under the fourth proposition of Lopes L.J.

The respondents are entitled to judgment on the grounds accepted by Lord Cranworth in *Western Bank of Scotland* v. *Addie* (11) and by the Earl of Selborne in *Smith* v. *Chadwick* (12). The belief which would justify the appellants must be one founded on an exercise of judgment. Grounds which would be sufficient in some cases would not be so in others, where uberrima fides is required, e.g. in statements made to an intending partner. As

(1) 25 L. J. (Q.B.) 129.
(2) 8 Ex. 725.
(3) 10 M. & W. 1, 10.
(4) 3 D. & J. 304, 312.
(5) Law Rep. 3 Ch. 467.
(6) 46 L. T. (N.S.) 497, 502.
(7) 20 Ch. D. 27, 44.
(8) 2 Sm. L. C, 9th ed. p. 74.
(9) 1 Ibid. p. 186.
(10) 2 East, 92.
(11) Law Rep. 1 H. L. (Sc.) 145, 161.
(12) 9 App. Cas. 187, 190.

to the duty of a director to persons about to take shares in a company, see *New Brunswick and Canada Railway Company* v. *Muggeridge* (1) and *Henderson* v. *Lacon* (2).

The House took time for consideration, LORD HALSBURY L.C. saying that notice would be given to the appellants if their Lordships desired to hear a reply.

July 1. LORD HALSBURY L.C.:—

My Lords, I have so recently expressed an opinion in the Court of Appeal on the subject of actions of this character that I do not think it necessary to do more than say that I adhere to what I there said (3). To quote the language now some centuries old in dealing with actions of this character, "fraud without damage or damage without fraud" does not give rise to such actions. I have had also the opportunity of reading the judgment of my noble and learned friend Lord Herschell, and I could desire to add nothing to his exhaustive and lucid treatment of the authorities.

My Lords, when I turn to the question of fact I confess I am not altogether satisfied. In the first place I think the statement in the prospectus was untrue,—untrue in fact, and to the minds of such persons as were likely to take shares I think well calculated to mislead. I think such persons would have no idea of the technical division between tramways that had rights to use mechanical means and tramways that had not. What I think they would understand would be that this particular tramway was in an exceptionably advantageous position,—that the statement was of a present existing fact, that it had at the time of the invited subscription for shares the right to use steam. And I think such a statement if wilfully made with the consciousness of its inaccuracy would give rise to an action for deceit, provided that damage had been sustained if a person had acted upon a belief induced by such a prospectus.

But upon the question whether these statements were made with a consciousness of their misleading character, I cannot but

(1) 1 Dr. & S. 363, 381. (2) Law Rep. 5 Eq. 249.
(3) See *Arnison* v. *Smith*, 41 Ch. D. 348, 367.

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be influenced by the opinions entertained by so many of your Lordships that they are consistent with the directors' innocence of any intention to deceive.

The learned judge who saw and heard the witnesses acquitted the defendants of intentional deceit, and although the Court of Appeal held them liable, overruling the decision of the learned judge below, they appear to me to have justified their decision upon grounds which I do not think tenable, namely, that they, the directors, were liable because they had no reasonable ground for the belief which nevertheless it is assumed they sincerely entertained.

My Lords, I think it would have been satisfactory to have had a more minute and exact account of how this prospectus was framed, the actual evidence of the draftsman of it, and the discussions which took place upon the alteration in form; which alteration gave such marked and peculiar prominence to the special feature of this particular tramway, in respect of the possession of power to use steam. Nevertheless, if, as I have said, the facts are reconcilable with the innocence of the directors, and with the absence of the mens rea which I consider an essential condition of an action for deceit, the mere fact of the inaccuracy of the statement ought not to be pressed into constituting a liability which appears to me not to exist according to the law of England.

As to the question whether Sir Henry Peek was induced to take his shares by reliance on the misleading statement, I admit that I have very considerable doubt. On the one hand I do not believe that any one can so far analyse his mental impressions as to be able to say what particular fact in a prospectus induced him to subscribe. On the other hand the description of Sir Henry Peek, even now that the question has been pointedly raised and brought to his mind, of what did or did not induce him to take his shares is hardly reconcilable with his having been substantially induced by the statement in question to take them.

On the whole I acquiesce in the judgment which one of your Lordships is about to move, namely, that the judgment appealed from be reversed.

LORD WATSON:—

My Lords, I agree with Stirling J. that, as matter of fact, the appellants did honestly believe in the truth of the representation upon which this action of deceit is based. It is by no means clear that the learned judges of the Court of Appeal meant to differ from that conclusion; but they seem to have held that a man who makes a representation with the view of its being acted upon, in the honest belief that it is true, commits a fraud in the eye of the law, if the court or a jury shall be of opinion that he had not reasonable grounds for his belief. I have no hesitation in rejecting that doctrine, for which I can find no warrant in the law of England. But I shall not trouble your Lordships with any observations of mine, because I accept without reserve the opinion about to be delivered by my noble and learned friend upon my left (Lord Herschell).

LORD BRAMWELL:—

My Lords, I am of opinion that this judgment should be reversed. I am glad to come to this conclusion; for, as far as my judgment goes, it exonerates five men of good character and conduct from a charge of fraud, which, with all submission, I think wholly unfounded, a charge supported on such materials as to make all character precarious. I hope this will not be misunderstood; that promoters of companies will not suppose that they can safely make inaccurate statements with no responsibility. I should much regret any such notion; for the general public is so at the mercy of company promoters, sometimes dishonest, sometimes over sanguine, that it requires all the protection that the law can give it. Particularly should I regret if it was supposed that I did not entirely disapprove of the conduct of those directors who accepted their qualification from the contractor or intended contractor. It is wonderful to me that honest men of ordinary intelligence cannot see the impropriety of this. It is obvious that the contractor can only give this qualification because he means to get it back in the price given for the work he is to do. That price is to be fixed by the directors who have taken his money. They are paid by him to give

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him a good price, as high a price as they can, while their duty to their shareholders is to give him one as low as they can.

But there is another thing. The public, seeing these names, may well say, "These are respectable and intelligent men who think well enough of this scheme to adventure their money in it; we will do the same," little knowing that those thus trusted had made themselves safe against loss if the thing turned out ill, while they might gain if it was successful. I am glad to think that Mr. Wilde, a member of my old profession, was not one of those so bribed. The only shade of doubt I have in the case is, that this safety from loss in the directors may have made them less careful in judging of the truth of any statements they have made.

There is another matter I wish to dispose of before going into the particular facts of the case. I think we need not trouble ourselves about "legal fraud," nor whether it is a good or bad expression; because I hold that actual fraud must be proved in this case to make the defendants liable, and, as I understand, there is never any occasion to use the phrase "legal fraud" except when actual fraud cannot be established. "Legal fraud" is only used when some vague ground of action is to be resorted to, or, generally speaking, when the person using it will not take the trouble to find, or cannot find, what duty has been violated or right infringed, but thinks a claim is somehow made out. With the most sincere respect for Sir J. Hannen I cannot think the expression "convenient." I do not think it is "an explanation which very clearly conveys an idea;" at least, I am certain it does not to my mind. I think it a mischievous phrase, and one which has contributed to what I must consider the erroneous decision in this case. But, with these remarks, I have done with it, and will proceed to consider whether the law is not that actual fraud must be proved, and whether that has been done.

Now, I really am reluctant to cite authorities to shew that actual fraud must be established in such a case as this. It is one of the first things one learned, and one has never heard it doubted until recently. I am very glad to think that my noble and learned friend (Lord Herschell) has taken the trouble to go into the authorities fully; but to some extent I deprecate it,

because it seems to me somewhat to come within the principle Qui s'excuse s'accuse. When a man makes a contract with another he is bound by it; and, in making it, he is bound not to bring it about by fraud. Warrantizando vendidit gives a cause of action if the warranty is broken. Knowingly and fraudulently stating a material untruth which brings about, wholly or partly, the contract, also gives a cause of action. To this may now be added the equitable rule (which is not in question here), that a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission. To found an action for damages there must be a contract and breach, or fraud. The statement of claim in this case states fraud. Of course that need not be proved merely because it is stated. But no one ever heard of or saw a statement of claim or declaration for deceit without it. There is not an authority at common law, or by a common law lawyer, to the contrary; none has been cited, though there may be some incautious, hesitating, expressions which point that way. Every case from the earliest in Comyns' Digest to the present day alleges it. Further, the learned judges of the Court of Appeal hardly deny it. There is indeed an opinion to the contrary of the late Master of the Rolls, but it must be remembered that his knowledge of actions of deceit was small, if any. I did not think, then, that it was necessary to cite cases to shew that to maintain this action fraud in the defendant must be shewn, though I am glad it has been done.

Now, as to the evidence. The plaintiff's case is that the defendants made an untrue statement, which they knew to be untrue, and likely to influence persons reading it; therefore they were fraudulent. It is not necessary to consider whether a primâ facie case was made out by the plaintiff. We have all the evidence before us, and must judge on the whole. The alleged untrue statement is that, "The company has the right to use steam or mechanical power instead of horses," and that a saving would be thereby effected. Now, this is certainly untrue, because it is stated as an absolute right, when in truth it was conditional on the approval of the Board of Trade, and the sanction or consent of two local boards; and a conditional right is

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not the same as an absolute right. It is also certain that the defendants knew what the truth was, and therefore knew that what they said was untrue. But it does not follow that the statement was fraudulently made. There are various kinds of untruth. There is an absolute untruth, an untruth in itself, that no addition or qualification can make true; as, if a man says a thing he saw was black, when it was white, as he remembers and knows. So, as to *knowing* the truth. A man may know it, and yet it may not be present to his mind at the moment of speaking; or, if the fact is present to his mind, it may not occur to him to be of any use to mention it. For example, suppose a man was asked whether a writing was necessary in a contract for the making and purchase of goods, he might well say "Yes," without adding that payment on receipt of the goods, or part, would suffice. He might well think that the question he was asked was whether a contract for goods to be made required a writing like a contract for goods in existence. If he was writing on the subject he would, of course, state the exception or qualification.

Now, consider the case here. These directors naturally trust to their solicitors to prepare their prospectus. It is prepared and laid before them. They find the statement of their power to use steam without qualification. It does not occur to them to alter it. They swear they had no fraudulent intention. At the very last they cannot see the fraud. There is their oath, their previous character unimpeached, and there is to my mind this further consideration: the truth would have served their purpose as well. "We have power to use steam, etc., of course with the usual conditions of the approval of the Board of Trade and the consent of the local authorities, but we may make sure of these being granted, as the Board of Trade has already allowed the power to be inserted in the Act, and the local authorities have expressed their approbation of the scheme." (See plaintiff's answer, 313 (1), which shews that he would have been content with that statement.)

During the argument I said I am not sure that I should not have passed the prospectus. I will not say so now, because

(1) The references are to the Appendix printed for the House.

certainly I would not pass it now after knowing the unfortunate use made of the statement, and no one can tell what would have been the state of his mind if one of the factors influencing it was wanting. But I firmly believe it might have been, and was, honestly done by these defendants. Stirling J. saw and heard them, and was of that opinion. It is difficult to say that the plaintiff was not. The report of the 6th of November 1884 shewed that the consent of the Board of Trade was necessary, shewed also that the corporation of Devonport would not consent, shewed therefore the "untruth" and the defendants' knowledge of it, and yet the plaintiff "had every confidence in the directors;" and see his answers to questions 53 and 365.

I now proceed to consider the judgments that have been delivered. It is not necessary to declare my great respect for those who have delivered them. Stirling J. refuses to say whether actual fraud must be shewn, and deals with the case on the footing that the question is whether the defendants had reasonable grounds for making the statement they did. He holds, as I do, that they thought the company had the right, as put in the prospectus, to use steam. Then he says he must "come to the conclusion that they had reasonable grounds for their belief; at all events, that their grounds were not so unreasonable as to justify me in charging them with being guilty of fraud." It is singular that the learned judge seems to consider that unreasonableness must be proved to such an extent as to shew fraud. He then proceeds, for what seem to me unanswerable reasons, to shew that they did every one believe that they had the right stated in the prospectus. He refers to what he saw of them in the box. He says he cannot come to the conclusion that their belief was so unreasonable and so unfounded, and their proceedings so reckless or careless that they ought to be fixed with the consequences of deceit. He makes an excellent remark, that "mercantile men dealing with matters of business would be the first to cry out if I extended the notion of deceit into what is honestly done in the belief that these things would come about, and when they did not come about, make them liable in an action of fraud." My only variation of this would be that it may be that the objection did not, and naturally did not, occur to them. It has

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not been argued, and I will say no more on the question, whether had the plaintiff known the contents of the Act he would or would not have applied for the shares, than that I agree with Stirling J.

Cotton L.J. says the law is "that where a man makes a statement to be acted on by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is without any reasonable ground for believing it to be true," he is liable to an action for deceit. Well, I agree to all before the "that is" and I agree to what comes after if it is taken as equivalent to what goes before, viz., "recklessly or without care whether it is true or false," understanding "recklessly" as explained by "without care whether it is true or false." For a man who makes a statement without care and regard for its truth or falsity commits a fraud. He is a rogue. For every man who makes a statement says "the truth is so and so, and I know it or believe it." I say I agree to this as I understand it.

It seems to me, with great respect, that the learned Lord Justice lost sight of his own definition, and glided into a different opinion. He says (p. 451, F.), "There is a duty cast upon a director who makes that statement to take care that there are no statements in it which in fact are false; to take care that he has reasonable ground for the material statements which are contained in that document (prospectus), which he intends to be acted on by others. And although in my opinion it is not necessary there should be what I should call fraud, there must be a departure from duty, . . . and he has violated the right which those who receive the statement have to have true statements only made to them." This seems to be a most formidable matter. I agree there is some such duty. I agree that not only directors in prospectuses, but all persons in all dealings should tell the truth. If they do not they furnish evidence of fraud; they subject themselves to have the contract rescinded. But to say that there is "a right to have true statements only made," I cannot agree, and I think it would be much to be regretted if there was any such right. Mercantile men, as Stirling J. says, would indeed cry out. No qualification is stated.

If this is law the statement may be reasonably believed to be true by him who makes it, but if untrue there is to be a cause of action; and that although he may have refused a warranty. I hope not. There is a duty to tell the truth, or, rather, what is believed to be the truth. At page 452, B., his Lordship says: "Where a man makes a false statement without reasonable ground to suppose it to be true, and without taking care to ascertain if it is true, he is liable civilly as much as a person who commits what is usually called fraud." I say I agree if that means making a statement of which he knows or believes not the truth. His Lordship proceeds to examine whether the defendants had reasonable ground for believing what they said, and comes to the conclusion that they had not, and so holds them liable, not because they were dishonest, but because they were unreasonable. I say they never undertook to be otherwise. He says (461 G.): "It is not that I attribute to them any intention to commit fraud, but they have made a statement without any sufficient reason for believing it to be true."

Sir James Hannen says that he agrees with Cotton L.J.'s statement of the law, and adds: "If a man takes upon himself to assert a thing to be true, which he does not know to be true, and has no reasonable ground to believe to be true," it is sufficient in an action of deceit. I agree, if he knows he has no such reasonable ground and the knowledge is present to his mind; otherwise, with great respect, I differ. He cites Lord Cairns (465 F.), that, "if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue." So say I, but this does not support Sir James's proposition. Nor does he deal with what he quotes from Lord Cranworth. But further (466), he speaks of legal fraud as meaning "that degree of moral culpability in the statement of an untruth to induce another to alter his position, to which the law attaches responsibility." But if there is moral culpability, I agree there is responsibility. But to believe without reasonable grounds is not moral culpability, but, (if there is such a thing) mental culpability. He says, "the word 'fraud' is in common parlance reserved for actions of great turpitude, but

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the law applies it to lesser breaches of moral duty." I agree the law applies it to all breaches of the moral duty to tell the truth in dealing with others; but that duty cannot be honestly broken. To be actionable, a breach of that duty must be dishonest. Nay, it is a man's duty sometimes to tell an untruth. For instance, when asked as to a servant's character, he must say what he believes is the truth, however he may have formed his opinion, and however wrong it may be. His Lordship says he cannot think the directors had any reasonable ground for believing the prospectus to be true. But had they the matter present to their minds? Even if this were the question I should decide in their favour.

As to the judgment of Lopes L.J., I quite agree with what he says: "I know of no fraud which will support an action of deceit to which some moral delinquency does not belong." I think that shews the meaning of what he says "fourthly," though that is made doubtful by what he says at 472 D.

I think, with all respect, that in all the judgments there is, I must say it, a confusion of unreasonableness of belief as evidence of dishonesty, and unreasonableness of belief as of itself a ground of action.

I have examined these judgments at this length owing to my sense of their importance and the importance of the question they deal with. I think it is most undesirable that actions should be maintainable in respect of statements, made unreasonably perhaps, but honestly. I think it would be disastrous if there was "a right to have true statements only made." This case is an example. I think that in this kind of case, as in some others, Courts of Equity have made the mistake of disregarding a valuable general principle in their desire to effect what is, or is thought to be, justice in a particular instance. It might, perhaps, be well to enact that in prospectuses of public companies there should be a warranty of the truth of all statements except where it was expressly said there was no warranty. The objection is to exceptional legislation, and to the danger of driving respectable and responsible men from being promoters, and of substituting for them those who are neither.

In this particular case I hold that unless fraud in the defendants could be shewn, the action is not maintainable. I am

satisfied there was no fraud. Further, if an unreasonable misstatement were enough, I hold there was none. Still further, I do not believe that the plaintiff was influenced by the misstatement, though I am entirely satisfied that he was an honest witness.

LORD FITZGERALD :—

My Lords, the pleadings and the facts have been already referred to by the noble Lords who have addressed the House. The action is for deceit. The writ was sued out in February 1885, and originally claimed rescission of the contract with the company. It was subsequently amended by striking out the company as defendants, and also the prayer for rescission, and it assumed the character of an action for deceit against the present appellants (five of the directors), and claimed "damages for the fraudulent misrepresentations of the defendants."

The statement of claim, which is sufficient in form to raise the real question, alleged the misrepresentation to exist in the prospectus issued in February 1883, and to consist of the paragraph so often read, that the company had a right to use steam or other mechanical motive power; and it was further alleged "that the defendants intended thereby to represent that the company had an absolute right to use steam and other mechanical power," and that such representation was made fraudulently, and with the view to induce the plaintiff to take shares in the company.

So far, my Lords, the real issue seems to have been raised fairly and clearly, and to depend on matters of fact. There were circumstances connected with the promotion of the company, and the procuring of four of the defendants to act as directors, which tended to create suspicion as to their statements and their bona fides, and attracted directly the attention of the learned judge before whom the case was tried. The defendants, who were severally produced as witnesses at the trial, were exposed to a very lengthened and searching cross-examination by counsel for the plaintiff, and were also carefully examined by the judge as to these transactions, with the result apparently of freeing them from any imputation therein of moral misconduct.

The question which I am about to examine in the first in-

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stance, and excluding for the present the element of fraud, is, whether the impugned statement in the prospectus was a false statement in the sense of being untrue. That it was inaccurate so far as it purported to give the legal effect of the special Act I do not doubt, but was it untrue as representing the position of the company in a popular and business sense? The General Tramways Act (33 & 34 Vict. c. 78), which regulates tramways generally, but subject to the provisions of the special Act, if any, of each company, places them under the supervision of the Board of Trade with a view to public safety, and for public protection generally, and by its 34th section it provides "that all carriages used on tramways shall be moved by the power prescribed by the special Act."

The special Act of this company became law on the 24th of July 1882, and by ss. 4 and 5 the company incorporated by the Act is empowered to make the seven tramways in question in all respects in accordance with the plans and sections. Sect. 15 provides minutely for their formation, subject to the orders of the Board of Trade, and by sect. 16 the tramway is not to be opened for public traffic until it shall have been inspected and certified by the Board of Trade to be fit for such traffic.

Before referring to the 35th section of the special Act we may glance at sect. 37 of that Act, which empowers the Board of Trade to make bye-laws as to any of the tramways on which steam may be used under the authority of the Act, and sect. 44, which provides that where the company intends to use steam they shall give two months' notice.

There are several other sections providing for the use of steam power if the company should elect to use it as the motor.

In the light of those sections of the special Act, and of sect. 34 of the general Act, let us now look at the particular paragraph of the prospectus, and sect. 35 of the special Act. By that section Parliament has done that which Parliament could do, and which the Board of Trade could not do. It has conferred on the company authority to use steam as its motive power. It has not imposed on the company the use of steam power, but it says that they may use it if they elect to do so. Before dealing with the consent of the Board of Trade I desire to call attention

to the proviso in the 35th section, "that the exercise of the powers hereby conferred with respect to the use of steam shall be subject to the regulations in Schedule 'A,' and to any regulations which may be added thereto or substituted therefor by the Board of Trade for securing to the public all reasonable protection against danger in the exercise of the powers by this Act conferred with respect to the use of steam."

Schedule A., referred to in sect. 35, contains no less than ten regulations for the direction of the company in the exercise of the right so conferred to use steam power.

Now, turning back to the words "with the consent of the Board of Trade," in sect. 35 of the special Act, that consent could not confer, nor would its absence take away, the right conferred by the legislature to use steam as a motor. Its true character is that of a precaution imposed by the legislature to defer the actual exercise of the right conferred until the supervision of the Board of Trade secures to the public all reasonable protections against danger. To attain these objects the legislature provides that the powers it has conferred should not be actually exercised without the consent of the Board of Trade.

My Lords, I have, though with difficulty, arrived at the conclusion that the statement in the prospectus, that by the special Act the company had the right to use steam power, was not untrue in a popular or business sense.

Let us see for a moment in what way and with what meaning General Hutchinson used similar expressions. In his report of the 12th of July 1884 he says: "The Act of 1882 gives, however, the company authority to use mechanical power over all their system, and I think it would be most objectionable that this power should be exercised on parts of Tramway No. 1 on account of the narrowness of three of the roads."

The remainder of the incriminated paragraph of the prospectus is, "and it is fully expected that by means of this (i.e., the use of steam) a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses." This was not untrue: there had been a division of opinion in the directory on the subject, which was finally and before the issue of the prospectus resolved in favour of steam.

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The conclusion I have arrived at, my Lords, is that this paragraph of the prospectus, though inaccurate in point of law in one particular, seems on the whole to have been morally true.

If this view is correct it is an answer to the action, but assuming that it is not correct, or that your Lordships are not prepared to adopt it, I proceed to express my opinion on the remaining substance of the action. Cotton L.J. describes the action as "an action of deceit, a mere common law action." The description is accurate, and I proceed to deal with it as a mere common law action. It has not been in the least altered in its characteristics by having been instituted in the Chancery Division, or tried by a judge without the aid of a jury, nor are your Lordships necessarily driven to consider on the present appeal some of the subtle and refined distinctions which have been engrafted on the clear and simple principles of the common law. The action for deceit at common law is founded on fraud. It is essential to the action that moral fraud should be established, and since the case of *Collins* v. *Evans* (1), in the Exchequer Chamber, it has never been doubted that fraud must concur with the false statement to maintain the action. It would not be sufficient to shew that a false representation had been made. It must further be established that the defendant knew at the time of making it that the representation was untrue, or, to adopt the language of the learned editors of the Leading Cases, that "the defendant must be shewn to have been actually and fraudulently cognisant of the falsehood of his representation or to have made it fraudulently without belief that it was true." The leading counsel for the respondent met the argument fairly on the allegations of fact. He alleged "that the defendants were not honest; that they stated in the prospectus a definite lie, and knew that it was a lie." That is the very issue, in fact, in the case.

The whole law and all the cases on the subject will be found in the notes to *Chandelor* v. *Lopus* (2) and *Pasley* v. *Freeman* (3). There is also a clear and able summary of the decisions, both in law and in equity, brought down to the present time in the recent edition of Benjamin on Sales, by Pearson-Gee and Boyd.

(1) 5 Q. B. 804, 820. (2) 1 Smith's L. C. 9th Ed. p. 186.
(3) 2 Smith's L. C. 9th Ed. p. 74.

I desire to make an observation on *Chandelor* v. *Lopus* (1). The report in Cro. Jac. 4 would seem to have but little direct bearing on the present case were it not for the opinion attributed to Anderson J.; but there is a valuable note in 1 Dyer by Vaillant (75a) which is as follows: Lopus brought an action upon the case against Chandelor, and shewed that, whereas the defendant was a goldsmith, and skilled in the nature of precious stones, and being possessed of a stone which the defendant asserted and assured the said plaintiff to be a true and perfect stone called a bezoar stone &c., upon which the plaintiff bought it &c. There the opinion of Popham C.J. was "that if I have any commodities which are damaged (whether victuals or otherwise), and I, *knowing them to be so*, sell them for good, and affirm them to be so, an action upon the case lies for the deceit: but although they be damaged, if I, *knowing not that*, affirm them to be good, still no action lies, without I warrant them to be good." The action seems originally to have been on a warranty which failed in fact, as there had been no warranty, and it was then sought to support it as an action for deceit; but it was not alleged in the count that the defendant knew the representation to be untrue. It was in reference to that that the observation of Popham C.J. was made. He had the reputation of being a consummate lawyer.

The note in 1 Dyer (75a) was probably by Mr. Treby, afterwards Chief Justice Treby. He edited an edition of Dyer published in 1688. I have not had an opportunity of referring to it, but it is said that he gave the public some highly authoritative notes in that edition. I have quoted from Mr. Vaillant's edition, published in 1794.

The whole evidence given on this appeal has been laid before your Lordships, and we have to deal with it as a whole. That evidence has been already so fully stated and criticised that it is not necessary for me to do more than to state the conclusions of fact which in my opinion are reasonably to be deduced from it, viz. that the several defendants did not know that the incriminated statement in the prospectus was untrue, and that, on the contrary, they severally and in good faith believed it to be

(1) 1 Smith's L. C. 9th Ed. p. 186.

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true. The conclusions, in fact, at which I have arrived, render it unnecessary for me to consider the long and rather bewildering list of authorities to which your Lordships were referred, or to criticise the reasons given in the Court of Appeal for their decision in the present case. I desire, however, to make a single observation.

There is one characteristic which, as it seems to me, pervades each of the several judgments in the Court of Appeal, viz. that the bonâ fide belief of the defendants in the truth of the representation was unavailing unless it was a reasonable belief resting on reasonable grounds. If this is correct, it seems to me that in an action for "deceit" it would be necessary to submit to the jury (if tried before that tribunal) not only the existence of that belief bonâ fide, but also the grounds on which it was arrived at, and their reasonableness.

I am by no means satisfied that such is the law, and if now driven to express an opinion on it, I would prefer following the opinion of Lord Cranworth in *Western Bank of Scotland* v. *Addie* (1), in which he said: "I confess that my opinion was that in what his Lordship (the Lord President) thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs, which they bonâ fide believe to be true, I cannot think they can be guilty of fraud, because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to shew that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

A director is bound in all particulars to be careful and circumspect, and not, either in his statements to the public or in the performance of the duties he has undertaken, to be careless

(1) Law Rep. 1 H. L., Sc. 145, 168.

or negligent, or rash. Want of care or circumspection, as well as recklessness, may in such a case as the present be taken into consideration in determining at every stage the question of bona fides.

My Lords, I am of opinion that the decision of the Court of Appeal should be reversed.

LORD HERSCHELL:—

My Lords, in the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants made in a prospectus issued by them certain statements which were untrue, that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company.

"This action is one which is commonly called an action of deceit, a mere common law action." This is the description of it given by Cotton L.J. in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extend beyond the particular action which was being dealt with, it must be remembered that the learned judges were not engaged in deter-

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mining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes* v. *Lock* (1) may be cited as an example, where a trustee had been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action. Lord Selborne pointed out in *Brownlie* v. *Campbell* (2) that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the Court of Appeal in the case before your Lordships. "An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit." This was the language of Cotton L.J. in *Arkwright* v. *Newbould* (3). It was adopted by Lord Blackburn in *Smith* v. *Chadwick* (4), and is not, I think, open to dispute.

In the Court below Cotton L.J. said: "What in my opinion is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of anyone to whom it was addressed or anyone of the class to whom it was addressed and who was

(1) 10 Ves. 470.
(2) 5 App. Cas. at p. 935.
(3) 17 Ch. D. 320.
(4) 9 App. Cas. 193.

materially induced by the misstatement to do an act to his prejudice." About much that is here stated there cannot, I think, be two opinions. But when the learned Lord Justice speaks of a statement made recklessly or without care whether it is true or false, *that is* without any reasonable ground for believing it to be true, I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the Court may think that there were no sufficient grounds to warrant his belief. I shall have to consider hereafter whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so, because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action.

That the learned Lord Justice thought that if a false statement were made without reasonable ground for believing it to be true an action of deceit would lie, is clear from a subsequent passage in his judgment. He says that when statements are made in a prospectus like the present, to be circulated amongst persons in order to induce them to take shares, "there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which in fact are false; to take care that he has reasonable ground for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others."

The learned judge proceeds to say: "Although in my opinion it is not necessary that there should be what I should call fraud, yet in these actions, according to my view of the law, there must be a departure from duty, that is to say, an untrue statement made without any reasonable ground for believing that statement

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to be true; and in my opinion when a man makes an untrue statement with an intention that it shall be acted upon without any reasonable ground for believing that statement to be true he makes a default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have to have true statements only made to them."

Now I have first to remark on these observations that the alleged "right" must surely be here stated too widely, if it is intended to refer to a legal right, the violation of which may give rise to an action for damages. For if there be a right to have true statements only made, this will render liable to an action those who make untrue statements, however innocently. This cannot have been meant. I think it must have been intended to make the statement of the right correspond with that of the alleged duty, the departure from which is said to be making an untrue statement without any reasonable ground for believing it to be true. I have further to observe that the Lord Justice distinctly says that if there be such a departure from duty an action of deceit can be maintained, though there be not what he should call fraud. I shall have by-and-by to consider the discussions which have arisen as to the difference between the popular understanding of the word "fraud" and the interpretation given to it by lawyers, which have led to the use of such expressions as "legal fraud," or "fraud in law;" but I may state at once that, in my opinion, without proof of fraud no action of deceit is maintainable. When I examine the cases which have been decided upon this branch of the law, I shall endeavour to shew that there is abundant authority to warrant this proposition.

I return now to the judgments delivered in the Court of Appeal. Sir James Hannen says: "I take the law to be that if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act and is thereby damnified, the person so damnified is entitled to maintain an action for deceit." Again, Lopes L.J. states what, in his opinion, is the result of the

cases. I will not trouble your Lordships with quoting the first three propositions which he lays down, although I do not feel sure that the third is distinct from, and not rather an instance of, the case dealt with by the second proposition. But he says that a person making a false statement, intended to be and in fact relied on by the person to whom it is made, may be sued by the person damaged thereby: "Fourthly, if it is untrue in fact, but believed to be true, but without any reasonable grounds for such belief."

It will thus be seen that all the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true, but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the Court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, Lopes L.J. expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

I need go no further back than the leading case of *Pasley* v. *Freeman* (1). If it was not there for the first time held that an action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the law was at all events not so well settled but that a distinguished Judge, Grose J., differing from his brethren on the Bench, held that such an action was not maintainable. Buller J., who held that the action lay, adopted in relation to it the language of Croke J., in 3 Bulstrode 95, who said: "Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies." In reviewing the case

(1) 2 Smith's L. C. 74.

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of *Crosse* v. *Gardner* (1) he says: "Knowledge of the falsehood of the thing asserted is fraud and deceit;" and further, after pointing out that in *Risney* v. *Selby* (2) the judgment proceeded wholly on the ground that the defendant knew what he asserted to be false, he adds: "The assertion alone will not maintain the action, but the plaintiff must go on to prove that it was false, *and that the defendant knew it to be so*," the latter words being specially emphasised. Kenyon C.J. said: "The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desired to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation stated on the record, by which they sustained damage. Can a doubt be entertained for a moment but that this is injurious to the plaintiffs?" In this case it was evidently considered that fraud was the basis of the action, and that such fraud might consist in making a statement known to be false.

Haycraft v. *Creasy* (3) was again an action in respect of a false affirmation made by the defendant to the plaintiff about the credit of a third party whom the plaintiff was about to trust. The words complained of were, "I can assure you of my own knowledge that you may credit Miss R. to any amount with perfect safety." All the judges were agreed that fraud was of the essence of the action, but they differed in their view of the conclusion to be drawn from the facts. Lord Kenyon thought that fraud had been proved, because the defendant stated that to be true within his own knowledge which he did not know to be true. The other judges thinking that the defendant's words vouching his own knowledge were no more than a strong expression of opinion, inasmuch as a statement concerning the credit of another can be no more than a matter of opinion, and that he did believe the lady's credit to be what he represented, held that the action would not lie. It is beside the present purpose to inquire which view of the facts was the more sound. Upon the law there was no difference of opinion. It is a distinct decision that knowledge of the falsity of the affirmation made is essential to the

(1) Carth. 90. (2) 1 Salk. 211.
(3) 2 East, 92.

maintenance of the action, and that belief in its truth affords a defence.

I may pass now to *Foster* v. *Charles* (1). It was there contended that the defendant was not liable, even though the representation he had made was false to his knowledge, because he had no intention of defrauding or injuring the plaintiff. This contention was not upheld by the Court, Tindal C.J. saying: "It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad." This is the first of the cases in which I have met with the expression "fraud in law." It was manifestly used in relation to the argument that the defendant was not actuated by a desire to defraud or injure the person to whom the representation was made. The popular use of the word "fraud" perhaps involves generally the conception of such a motive as one of its elements. But I do not think the Chief Justice intended to indicate any doubt that the act which he characterised as a fraud in law was in truth fraudulent as a matter of fact also. Wilfully to tell a falsehood, intending that another shall be led to act upon it as if it were the truth, may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made.

Foster v. *Charles* (1) was followed in *Corbett* v. *Brown* (2), and shortly afterwards in *Polhill* v. *Walter* (3). The learned counsel for the respondent placed great reliance on this case, because although the jury had negatived the existence of fraud in fact the defendant was nevertheless held liable. It is plain, however, that all that was meant by this finding of the jury was, that the defendant was not actuated by any corrupt or improper motive, for Lord Tenterden says, "It was contended that . . . in order to maintain this species of action it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff; it was said to be enough if a representation is made which the party

(1) 7 Bing. 105. (2) 8 Bing. 33.
(3) 3 B. & Ad. 114.

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making it knows to be untrue, and which is intended by him, or which from the mode in which it is made is calculated, to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be in the legal sense of the word *a fraud*, and for this position was cited *Foster* v. *Charles* (1), to which may be added the recent case of *Corbett* v. *Brown* (2). The principle of these cases appears to us to be well founded, and to apply to the present."

In a later case of *Crawshay* v. *Thompson* (3) Maule J. explains *Polhill* v. *Walter* (4) thus: "If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure. That is the effect of *Polhill* v. *Walter*" (4). In the same case, Cresswell J. defines "fraud in law," in terms which have been often quoted. "The cases," he says, "may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact to the injury of another."

In *Moens* v. *Heyworth* (5), which was decided in the same year as *Crawshay* v. *Thompson* (3), Lord Abinger having suggested that an action of fraud might be maintained where no moral blame was to be imputed, Parke B. said: "To support that count (viz., a count for fraudulent representation) it was essential to prove that the defendants *knowingly*" (and I observe that this word is emphasised), "by words or acts, made such a representation as is stated in the third count, relative to the invoice of these goods, as they knew to be untrue."

The next case in the series, *Taylor* v. *Ashton* (6), is one which strikes me as being of great importance. It was an action brought against directors of a bank for fraudulent representations as to its affairs, whereby the plaintiff was induced to take shares. The jury found the defendants not guilty of fraud, but expressed the opinion that they had been guilty of gross negligence. Exception was taken to the mode in which the case was left to the jury, and it was contended that their verdict was sufficient

(1) 7 Bing. 105.
(2) 8 Bing. 33.
(3) 4 M. & Gr. 357.
(4) 3 B. & Ad. 114.
(5) 10 M. & W. at p. 157.
(6) 11 M. & W. 401.

to render the defendants liable; Parke B., however, in delivering the opinion of the Court said: "It is insisted that even that (viz., the gross negligence which the jury had found), accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be *fraudulently made*. . . . But then it was said that in order to constitute that fraud, it was not necessary to shew that the defendants *knew* the fact they stated to be untrue, that it was enough that the fact *was* untrue if they communicated that fact for a deceitful purpose, and to that proposition the Court is prepared to assent. It is not necessary to shew that the defendants knew the facts to be untrue; if they stated a fact which was untrue for a fraudulent purpose, they at the same time *not believing* that fact to be true, in that case it would be both a legal and moral fraud."

Now it is impossible to conceive a more emphatic declaration than this, that to support an action of deceit fraud must be proved, and that nothing less than fraud will do. I can find no trace of the idea that it would suffice if it were shewn that the defendants had not reasonable grounds for believing the statements they made. It is difficult to understand how the defendants could, in the case on which I am commenting, have been guilty of gross negligence in making the statements they did, if they had reasonable grounds for believing them to be true, or if they had taken care that they had reasonable grounds for making them.

All the cases I have hitherto referred to were in courts of first instance. But in *Collins* v. *Evans* (1) they were reviewed by the Exchequer Chamber. The judgment of the Court was delivered by Tindal C.J. After stating the question at issue to be "whether a statement or representation which is false in fact, but not known to be so by the party making it, but, on the contrary, made honestly and in the full belief that it is true, affords a ground of action," he proceeds to say: "The current of

(1) 5 Q. B. 804, 820.

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the authorities, from *Pasley* v. *Freeman* (1) downwards, has laid down the general rule of law to be, that fraud must concur with the false statement in order to give a ground of action." Is it not clear that the Court considered that fraud was absent if the statement was "made honestly, and in the full belief that it was true"?

In *Evans* v. *Edmonds* (2) Maule J. expressed an important opinion, often quoted, which has been thought to carry the law further than the previous authorities, though I do not think it really does so. He said: "If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood the representation may still have been fraudulently made." The foundation of this proposition manifestly is, that a person making any statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it *knows*, yet at least that he *believes* it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true.

I now arrive at the earliest case in which I find the suggestion that an untrue statement made without reasonable ground for believing it will support an action for deceit. In *Western Bank of Scotland* v. *Addie* (3) the Lord President told the jury "that if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank false in themselves and which they did not believe, or had no reasonable ground to believe to be true, that would be a misrepresentation and deceit." Exception having been taken to this direction without avail in the Court of Session, Lord Chelmsford in this House said: "I agree in the propriety of this

(1) 2 Smith's L. C. 74. (2) 13 C. B. 777.
(3) Law Rep. 1 H. L., Sc. 145, 162.

interlocutor. In the argument upon this exception the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury, upon this direction, would have to judge. But supposing a person makes an untrue statement which he asserts to be the result of a bonâ fide belief in its truth, how can the bona fides be tested except by considering the grounds of such belief? And if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterised as misrepresentation and deceit."

I think there is here some confusion between that which is evidence of fraud, and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned Lord intended to go further, as apparently he did, and to say that though the belief was really entertained, yet if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act, but he is not, in my opinion, fraudulent in the sense in which that word was used in all the cases from *Pasley* v. *Freeman* (1) down to that with which I am now dealing. Even when the expression "fraud in law" has been employed, there has always been present, and regarded as an essential element, that the deception was wilful either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing.

(1) 2 Smith's L. C. 71.

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I have made these remarks with the more confidence because they appear to me to have the high sanction of Lord Cranworth. In delivering his opinion in the same case he said: "I confess that my opinion was that in what his Lordship (the Lord President) thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they bonâ fide believe to be true, I cannot think they can be guilty of fraud because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to shew that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

Sir James Hannen, in his judgment below, seeks to limit the application of what Lord Cranworth says to cases where the statement made is a matter of opinion only. With all deference I do not think it was intended to be or can be so limited. The direction which he was considering, and which he thought went beyond what true principle warranted, had relation to making false statements of importance in regard to the affairs of the bank. When this is borne in mind, and the words which follow those quoted by Sir James Hannen are looked at, it becomes to my mind obvious that Lord Cranworth did not use the words "the opinion which they had formed" as meaning anything different from "the belief which they entertained."

The opinions expressed by Lord Cairns in two well-known cases have been cited as though they supported the view that an action of deceit might be maintained without any fraud on the part of the person sued. I do not think they bear any such construction. In the case of *Reese Silver Mining Co.* v. *Smith* (1) he said: "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue

(1) Law Rep. 4 H. L. 64, 79.

they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." This must mean that the persons referred to were conscious when making the assertion that they were ignorant whether it was true or untrue. For if not it might be said of any one who innocently makes a false statement. He must be ignorant that it is untrue, for otherwise he would not make it innocently; he must be ignorant that it is true, for by the hypothesis it is false. Construing the language of Lord Cairns in the sense I have indicated, it is no more than an adoption of the opinion expressed by Maule J. in *Evans* v. *Edmonds* (1). It is a case of the representation of a person's belief in a fact when he is conscious that he knows not whether it be true or false, and when he has therefore no such belief. When Lord Cairns speaks of it as not being fraud in the more invidious sense, he refers, I think, only to the fact that there was no intention to cheat or injure.

In *Peek* v. *Gurney* (2) the same learned Lord, after alluding to the circumstance that the defendants had been acquitted of fraud upon a criminal charge, and that there was a great deal to shew that they were labouring under the impression that the concern had in it the elements of a profitable commercial undertaking, proceeds to say: "They may be absolved from any charge of a wilful design or motive to mislead or defraud the public. But in a civil proceeding of this kind all that your Lordships have to examine is the question, was there, or was there not, misrepresentation in point of fact? If there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which properly would result from what was done." In the case then under consideration it was clear that if there had been a false statement of fact it had been knowingly made. Lord Cairns certainly could not have meant that in an action of deceit the only question to be considered was whether or not there was misrepresentation in point of fact. All that he there pointed out was that in such a case motive was immaterial: that it mattered not that there was no design to mislead or defraud the public if a false representation were knowingly made. It was therefore but an affirmation of the law laid down in *Foster*

(1) 13 C. B. 777.

(2) Law Rep. 6 H. L. 377, 409.

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v. *Charles* (1), *Polhill* v. *Walter* (2), and other cases I have already referred to.

I come now to very recent cases. In *Weir* v. *Bell* (3) Lord Bramwell vigorously criticised the expression "legal fraud," and indicated a very decided opinion that an action founded on fraud could not be sustained except by the proof of fraud in fact. I have already given my reasons for thinking that, until recent times at all events, the judges who spoke of fraud in law did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure.

In the same case Cotton L.J. stated the law in much the same way as he did in the present case, treating "recklessly" as equivalent to "without any reasonable ground for believing" the statements made. But the same learned judge in *Arkwright* v. *Newbold* (4) laid down the law somewhat differently, for he said: "In an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true." And his exposition of the law was substantially the same in *Edgington* v. *Fitzmaurice* (5). In this latter case Bowen L.J. defined what the plaintiff must prove in addition to the falsity of the statement, as "secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false."

It only remains to notice the case of *Smith* v. *Chadwick* (6). The late Master of the Rolls there said, "A man may issue a prospectus or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions, and did not intend to defraud." This, like everything else that fell from that learned judge, is worthy of respectful consideration. With the last sentence I quite agree,

(1) 7 Bing. 105.
(2) 3 B. & Ad. 114.
(3) 3 Ex. D. 238.
(4) 17 Ch. D. 301.
(5) 29 Ch. D. 459.
(6) 20 Ch. D. 27, 44, 67.

but I cannot assent to the doctrine that a false statement made through carelessness, and which ought to have been known to be untrue, of itself renders the person who makes it liable to an action for deceit. This does not seem to me by any means necessarily to amount to fraud, without which the action will not, in my opinion, lie.

It must be remembered that it was not requisite for Sir George Jessel in *Smith* v. *Chadwick* (1) to form an opinion whether a statement carelessly made, but honestly believed, could be the foundation of an action of deceit. The decision did not turn on any such point. The conclusion at which he arrived is expressed in these terms: "On the whole I have come to the conclusion that this, although in some respects inaccurate, and in some respects not altogether free from imputation of carelessness, was a fair, honest, and bonâ fide statement on the part of the defendants, and by no means exposes them to an action for deceit."

I may further note that in the same case, Lindley L.J. said: "The plaintiff has to prove, first, that the misrepresentation was made to him; secondly, he must prove that it was false; thirdly, that it was false to the knowledge of the defendants, or at all events that they did not believe the truth of it." This appears to be a different statement of the law to that which I have just criticised, and one much more in accord with the prior decisions.

The case of *Smith* v. *Chadwick* was carried to your Lordships' House (2). Lord Selborne thus laid down the law: "I conceive that in an action of deceit it is the duty of the plaintiff to establish two things: first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and secondly, he must establish that this fraud was an inducing cause to the contract." It will be noticed that the noble and learned Lord regards the proof of actual fraud as essential, all the other matters to which he refers are elements to be considered in determining whether such fraud has been

(1) 20 Ch. D. 27, 44, 67. (2) 9 App. Cas. 187, 190.

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established. Lord Blackburn indicated that although he nearly agreed with the Master of the Rolls, that learned judge had not quite stated what he conceived to be the law. He did not point out precisely how far he differed, but it is impossible to read his judgment in this case, or in that of *Brownlie* v. *Campbell* (1) without seeing that in his opinion proof of actual fraud or of a wilful deception was requisite.

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley* v. *Freeman* (2) down to *Western Bank of Scotland* v. *Addie* (3) in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shewn that this view was at once dissented from by Lord Cranworth, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until

(1) 5 App. Cas. 925. (2) 2 Smith's L. C. 74.
(3) Law Rep. 1 H. L., Sc. 145.

the case of *Weir* v. *Bell* (1), where it seems to be involved in Lord Justice Cotton's enunciation of the law of deceit. But no reason is there given in support of the view, it is treated as established law. The dictum of the late Master of the Rolls, that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed Cotton L.J. himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shews to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of *Taylor* v. *Ashton* (2) appears to me to be in direct conflict with the dictum of Sir George Jessel, and inconsistent with the view taken by the learned judges in the Court below. I observe that Sir Frederick Pollock, in his able work on Torts (p. 243, note), referring, I presume, to the dicta of Cotton L.J. and Sir George Jessel M.R., says that the actual decision in *Taylor* v. *Ashton* (2) is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was

(1) 3 Ex. D. 238. (2) 11 M. & W. 401.

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destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie* v. *Campbell* (1), a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

It now remains for me to apply what I believe to be the law to the facts of the present case. The charge against the defendants is that they fraudulently represented that by the special Act of Parliament which the company had obtained they had a right to use steam or other mechanical power instead of horses. The test which I purpose employing is to inquire whether the defendants knowingly made a false statement in this respect, or whether, on the contrary, they honestly believed what they stated to be a true and fair representation of the facts. Before considering whether the charge of fraud is proved, I may say that I

(1) 5 App. Cas. at p. 952.

approach the case of all the defendants, except Wilde, with the inclination to scrutinise their conduct with severity. They most improperly received sums of money from the promoters, and this unquestionably lays them open to the suspicion of being ready to put before the public whatever was desired by those who were promoting the undertaking. But I think this must not be unduly pressed, and when I find that the statement impeached was concurred in by one whose conduct in the respect I have mentioned was free from blame, and who was under no similar pressure, the case assumes, I think, a different complexion.

I must further remark that the learned judge who tried the cause, and who tells us that he carefully watched the demeanour of the witnesses and scanned their evidence, came without hesitation to the conclusion that they were witnesses of truth, and that their evidence, whatever may be its effect, might safely be relied on. An opinion so formed ought not to be differed from except on very clear grounds, and after carefully considering the evidence, I see no reason to dissent from Stirling J.'s conclusion. I shall therefore assume the truth of their testimony.

I agree with the Court below that the statement made did not accurately convey to the mind of a person reading it what the rights of the company were, but to judge whether it may nevertheless have been put forward without subjecting the defendants to the imputation of fraud, your Lordships must consider what were the circumstances. By the General Tramways Act of 1870 it is provided that all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only (1). In order, therefore, to enable the company to use steam-power, an Act of Parliament had to be obtained empowering its use. This had been done, but the power was clogged with the condition that it was only to be used with the consent of the Board of Trade. It was therefore incorrect to say that the company had the right to use steam; they would only have that right if they obtained the consent of the Board of Trade. But it is impossible not to see that the fact which would impress itself upon the minds of those connected with the company was that they had, after submitting

(1) 33 & 34 Vict. c. 78, s. 34.

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the plans to the Board of Trade, obtained a special Act empowering the use of steam. It might well be that the fact that the consent of the Board of Trade was necessary would not dwell in the same way upon their minds, if they thought that the consent of the Board would be obtained as a matter of course if its requirements were complied with, and that it was therefore a mere question of expenditure and care. The provision might seem to them analogous to that contained in the General Tramways Act, and I believe in the Railways Act also, prohibiting the line being opened until it had been inspected by the Board of Trade and certified fit for traffic, which no one would regard as a condition practically limiting the right to use the line for the purpose of a tramway or railway. I do not say that the two cases are strictly analogous in point of law, but they may well have been thought so by business men.

I turn now to the evidence of the defendants. I will take first that of Mr. Wilde, whose conduct in relation to the promotion of the company is free from suspicion. He is a member of the Bar and a director of one of the London tramway companies He states that he was aware that the consent of the Board of Trade was necessary, but that he thought that such consent had been practically given, inasmuch as, pursuant to the Standing Orders, the plans had been laid before the Board of Trade with the statement that it was intended to use mechanical as well as horse-power, and no objection having been raised by the Board of Trade, and the Bill obtained, he took it for granted that no objection would be raised afterwards, provided the works were properly carried out. He considered, therefore, that, practically and substantially they had the right to use steam, and that the statement was perfectly true.

Mr. Pethick's evidence is to much the same effect. He thought the Board of Trade had no more right to refuse their consent than they would in the case of a railway; that they might have required additions or alterations, but that on any reasonable requirements being complied with they could not refuse their consent. It never entered his thoughts that after the Board had passed their plans, with the knowledge that it was proposed to use steam, they would refuse their consent.

Mr. Moore states that he was under the impression that the passage in the prospectus represented the effect of sect. 35 of the Act, inasmuch as he understood that the consent was obtained. He so understood from the statements made at the board by the solicitors to the company, to the general effect that everything was in order for the use of steam, that the Act had been obtained subject to the usual restrictions, and that they were starting as a tramway company, with full power to use steam as other companies were doing.

Mr. Wakefield, according to his evidence, believed that the statement in the prospectus was fair; he never had a doubt about it. It never occurred to him to say anything about the consent of the Board of Trade, because as they had got the Act of Parliament for steam he presumed at once that they would get it.

Mr. Derry's evidence is somewhat confused, but I think the fair effect of it is that though he was aware that under the Act the consent of the Board of Trade was necessary, he thought that the company having obtained their Act the Board's consent would follow as a matter of course, and that the question of such consent being necessary never crossed his mind at the time the prospectus was issued. He believed at that time that it was correct to say they had the right to use steam.

As I have said, Stirling J. gave credit to these witnesses, and I see no reason to differ from him. What conclusion ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the Board of Trade would follow as a matter of course because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established.

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It is not unworthy of note that in his report to the Board of Trade, General Hutchinson, who was obviously aware of the provisions of the special Act, falls into the very same inaccuracy of language as is complained of in the defendants, for he says: "The Act of 1882 gives the company authority to use mechanical power over all their system."

I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe. I have applied this test, with the result that I have a strong conviction that a reasonable man situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the representation made was substantially true.

Adopting the language of Jessel M.R. in *Smith* v. *Chadwick* (1), I conclude by saying that on the whole I have come to the conclusion that the statement, "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest and bonâ fide statement on the part of the defendants, and by no means exposes them to an action for deceit."

I think the judgment of the Court of Appeal should be reversed.

Order of the Court of Appeal reversed; order of Stirling J. restored; the respondent to pay to the appellants their costs below and in this House: cause remitted to the Chancery Division.

Lords Journals 1st July 1889.

Solicitors for appellants: *Linklater, Hackwood, Addison & Brown.*

Solicitors for respondent: *Tamplin, Tayler & Joseph.*

(1) 20 Ch. D. at p. 67.

[HOUSE OF LORDS.]

THE NEW YORK LIFE INSURANCE COMPANY . . . . . } APPELLANTS,

AND

STYLES (SURVEYOR OF TAXES) . . . . . RESPONDENT.

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Revenue, Inland—Income Tax—Insurance Company, Life—Mutual Insurance—Return of Premium—Bonuses—Trading—Annual Profits or Gains— 16 & 17 *Vict. c.* 34, *Sched. D.*

A life insurance company had no shares or shareholders. The only members were the holders of participating policies, each of whom was entitled to a share of the assets and liable to all losses. A calculation was made by the company of the probable death rate among the members and of the probable expenses and other liabilities, and the amount claimed for premiums from members was commensurate therewith. An account was annually taken and the greater part of the surplus of such premiums over expenditure referable to these policies was returned to the policy-holders as bonuses, either by addition to the sums insured or in reduction of future premiums. The remainder of the surplus was carried forward as funds in hand to the credit of the general body of the members. It being admitted that the income derived by the company from investments, and from all transactions with persons not members, was assessable to income tax:—

Held, by Lords Watson, Bramwell, Herschell and Macnaghten, Lord Halsbury L.C. and Lord FitzGerald dissenting, that no part of the premium income received under participating policies was liable to be assessed to income tax as profits or gains under schedule D; and that *Last* v. *London Assurance Corporation* (10 App. Cas. 438) was distinguishable, the income in that case being derived from transactions with persons not members and not (as in the present case) from mutual insurances between members only:—

Held, by Lord Halsbury L.C. and Lord FitzGerald, that *Last* v. *London Assurance Corporation* governed the present case, and that the surplus returned or credited to members was liable to income tax.

APPEAL from a decision of the Court of Appeal on a case stated under 43 & 44 Vict. c. 19 s. 59 by the Income Tax Commissioners for the city of London, for the opinion of the Queen's Bench Division, of which the following parts are material.

At meetings of the Commissioners held in 1886 the New York

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Life Insurance Company appealed against two assessments of £50,000 and £50,000 under Schedule D to 16 & 17 Vict. c. 34 for the years ending the 5th of April 1885 and the 5th of April 1886 respectively made upon them under the following circumstances:—

The company was incorporated by special Act of the legislature of New York dated the 18th of April 1843. The central office is in New York and the company there carries on the business of insurance on lives and all and every insurance appertaining to life. All the corporate powers of the company are exercised by a board of trustees and such officers and agents as they may appoint. A branch or department of the company for Great Britain and Ireland under the management of a general manager appointed by the trustees and responsible to them has been established and carries on business in London.

The company has no shareholders and there are no shares. The company is organized for and (except as hereinafter stated) does business solely under the plan of mutual insurance. Each policy-holder is a member of the company and is entitled to a share of the assets of the company and liable to all losses and expenses incurred by the company as provided by the 11th clause of the company's charter hereinafter set forth.

A calculation is made by the company of the probable death-rate among the members of the company and of the probable expenses and other liabilities of the company, and the amount claimed for premiums from the policy-holders is commensurate therewith.

The 11th clause of the company's charter was as follows:—

"11. The officers of the company at the expiration of one year from the time that the first policy shall have been issued and bears date and within one month thereafter, and during the first month after the expiration of every subsequent year, shall cause an estimate to be made of the profits and true state of the affairs of the said company as near as may be for the preceding year, and so on for each successive year, which estimate shall be conclusive upon all persons entitled to receive certificates as hereinafter provided for, and shall thereupon cause a balance to be struck of the affairs of the company in which they shall charge

each member with a proportionate share of the losses of the company according to the original amount of premium paid by him, but in no case shall such share exceed the amount of such premium. Such member shall be credited with his proportionate share of the amount of premiums earned after deducting losses and expenses and of the profits of the company derived from investments, which share of profits derived from investments shall be paid to such members, and for his proportionate share of the premiums earned he shall be entitled to a certificate on the books of the company of the amount remaining to his credit in the said company, such certificate to contain a proviso that the amount therein is liable for any future loss by said company. No certificates however shall be issued for any sum less than ten dollars nor for the fractional part of sums between even tens of dollars, but all such fractional parts of sums and sums less than ten dollars shall be placed to the contingent account of the company and applied to the expenses and other charges of the years to which they appertain."

A copy of the charters under which the company is established and carries on business forms part of this case.

The certificates above mentioned are not issued by the company and are not held by any members of the company or other persons in the United Kingdom or elsewhere.

An account is compiled every year of the income of the company arising—1. From premiums and annuities; 2. From interest received and accrued including premiums on gold, rents &c.

A corresponding account is also taken every year of the expenditure of the company arising—1. From claims by death; 2. From matured endowments, that is to say payment of the money assured to be paid on the arrival of a fixed period; 3. From annuities payable; 4. From payments for surrendered policies; 5. From commission, medical fees, taxes, and expenses; 6. From contingent fund or sum set aside to answer any estimated depreciation in the value of securities.

The chief part of the surplus as shewn by the accounts is paid, or as the company alleges is returned, to the policy-holders as bonuses in addition to the sums insured, or in reduction of the

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premiums required from them. The company does not pay the bonuses in cash, but the amount of the same is deducted from the next premium due, or is added to the policy. The remainder of the said surplus is carried forward as funds in hand to the credit of the general body of the members of the company.

The income of the company is solely derived from premiums paid by members of the company or by holders of non-participating policies, from the purchase-moneys paid for annuities granted by the company, and from the interest, dividends, or annual income arising from the investment of the company's assets.

A correct triennial statement of accounts deposited by the company with the Board of Trade, and a form of the ordinary life assurance policy of the company, and prints of the prospectuses and annual accounts of the company for the years 1882, 1883, 1884, and 1885, form part of this case.

The company in consideration of single payments grants annuities on lives. Neither the payment of the said consideration nor the receipt of the said annuities constitutes a membership of the company.

The company in consideration of fixed premiums grants policies of assurance of a fixed sum of money payable on death or at a fixed period. The holders of such non-participating policies have no interest in the assets of the company, nor are they subject to any losses or liabilities of the company The non-participating policy-holders are not members of the company.

Out of the premium income received by the company in the United Kingdom claims under policies payable in the United Kingdom and the expenses of the company incurred in the United Kingdom are first paid and satisfied, and the balance is invariably remitted to the head office at New York, in which state the same is invested according to the terms of the company's charter in like manner as other income of the company.

It was contended by the Surveyor of Taxes on the above facts that the surplus so far as the same is derived from premiums received in the United Kingdom is a profit or gain of the company liable to be assessed to income tax under Schedule D to the Act 16 & 17 Vict. c. 34, and he cited the case of *Last*

v. *London Assurance Corporation* (1) in support of his contention.

The company, however, contended that a distinction existed between that case and that of the present appeal, inasmuch as the London Assurance Corporation received premiums in pursuance of, and derived profits from, contracts between that corporation and their policy-holders who were not members of that corporation, whilst the premiums paid to the New York Life Insurance Company are contributed by members of the company as an estimated amount required to cover the risks for the year and the necessary expenses, and that any surplus or balance remaining over and above the sum that may actually be required for such purposes is not profit or gain liable to assessment, but is in fact an excess of contribution over expenditure.

The Commissioners of Taxes were of opinion:—

1st. That no part of the premium income of the company received under participating policies is liable to be assessed to income tax as profits or gains chargeable under Schedule D to the Act 16 & 17 Vict. c. 34.

2nd. That the company was, however, liable to be assessed in respect of profits made on annuities granted; also 3rd, on profits made from premiums paid under non-participating policies; also 4th, on all income derived by or from investment of all premiums or other money paid to them in the United Kingdom and invested in the United Kingdom or abroad, and as to the latter when such income is received in the United Kingdom; also 5th, on all profits (if any) derived in any mode other than by the annual premium contributions of the participating policy-holders.

The question for the opinion of the Court is, whether on the above facts the finding of the Commissioners is or is not correct in the first of the above five cases. If the Court is of opinion that the finding of the Commissioners is wrong on the first of the above questions the case is to be remitted to them for their further decision as to the amount of the assessment.

The policies contained a clause of forfeiture in certain events.

(1) 10 App. Cas. 438.

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A statement respecting the valuation of the liabilities, under life and annuity policies of the New York Life Insurance Company, made by the actuary, contained the following paragraphs (inter alia):—

"The valuation is made up to the 31st day of December, 1883. By the charter of the company, its officers are required to cause an annual valuation to be made of the assets and liabilities, and to determine the profits resulting from the business of the preceding year. From these profits the trustees are authorized to declare a dividend to such policy-holders as may be entitled thereto.

"By the regulations of the company, such portion of the profits thus ascertained as the trustees deem prudent, is divided among the policy-holders on what is known as the "contribution plan." Under this plan due regard is had to the relations existing between policies of different classes, ages, and duration, and the return to each policy-holder is in proportion to the surplus which it is calculated he has contributed to the divisible fund of the company, over and above the sum which it has cost to carry his insurance.

"This valuation being made on nett premiums, the proportion of the annual premiums reserved for future expenses and profits, and therefore left unvalued, is the entire 'loading' or margin between the tabular premium charged and the relative pure or nett premium.

"Dividends are declared on all policies entitled to participate which have been in force one year.

"The dividends of the company are declared in the form of reversionary additions to the policies."

The Queen's Bench Division (Stephen and Wills JJ.) being of opinion that the case could not be distinguished from *Last* v. *London Assurance Corporation* (1), held that the premium income of the company received under participating policies was liable to be assessed to income tax and reversed the determination of the Commissioners as to the first of the above five cases. This decision was affirmed by the Court of Appeal (Lord Esher M.R. Fry and Lopes L.JJ.). Against these decisions the company brought the present appeal.

(1) 10 App. Cas. 438.

March 26, 28. *Finlay* Q.C. and *A. M. Bremner* for the appellants:—

The question is whether where members of a mutual insurance company make contributions towards the expected expenses, and there is a surplus after paying the expenses, income tax is payable upon the surplus which is returned to the contributors. There is a broad distinction between contributions from members made for the purpose of insuring one another and receipts from non-members. Upon the latter it is admitted that income tax is payable. The source from which the fund comes makes the difference. More has been collected from members than is needed; the surplus is not "profits or gains"; and it is not "profits" merely because it may be so called in the company's documents. Suppose five men contribute £10 each towards a tour. At the end of the tour the expenses are only £45. The £5 which is returned to the contributors is not "profits." They have not made a "gain" of £1 each. Suppose again that they play music on the tour and their receipts exactly equal the amount of the expenses, or half that amount. The £50 or the £25 (as the case may be) which is returned to be distributed among the contributors is not profits. There can be no profits till the whole contributions are returned.

[LORD BRAMWELL:—Several persons contribute sums towards a book club, to continue for a year. At the end of the year the expenses are less than the fund. Are the amounts returned "profits"?]

The company is bound by contract to return the members' contributions; and the obligation is the same as the liability to pay rent or any other outgoing. To be taxable the "income" must "come in" from the outside. These contributions are from within. The general business of the company is no doubt a trade; but not this part. Isolate this transaction from the rest of the company's business (as to which income tax is admittedly payable); and what is left? Nothing but mutual insurance. In order to meet outgoings it is convenient that there should be a fund; it would be inconvenient to collect contributions from members every time a death occurred. Therefore members contribute in advance enough

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to make a surplus; it is always intended that there shall be a surplus. The amount of the surplus no doubt depends on the skill with which the lives are accepted and the management is conducted; but so it would if men contributed towards a fund to buy an estate and employed an agent to buy; the more or less to be returned would depend on the skill and prudence of the agent. The members do not desire to make a profit upon this transaction; they desire to do it as cheaply as possible. If the surplus were profit it would be a profit made out of themselves, and the larger the contribution the larger would be the surplus and therefore the profit. This consideration is conclusive as to its not being profit. The only difficulty arises from the decision of this House in *Last* v. *London Assurance Corporation* (1), which the Courts below could not distinguish. That decision however unsound is of course binding, but it lays down no principle and turns entirely on its own circumstances. The present case is that of mutual insurance and is entirely distinguishable.

Sir *R. E. Webster* A.G. and *A. V. Dicey* (Sir *E. Clarke* S.G. with them) for the respondent:—

The decision in *Last* v. *London Assurance Corporation* (1) is conclusive. If there be any distinction the present case is à fortiori. The surplus which is repaid to the contributors is not merely the excess of the contributions over the expenditure, it is the result of management; the amount depends on the skill and prudence of the management. The analogies suggested contrà are not really analogous. The moneys contributed are intended to and do increase the value of the contributors' interests, and are therefore profits and gains. The policies are issued upon the express condition of forfeiture in case of default in paying premiums and under other specified circumstances. Upon such a forfeiture the policy-holder is entitled to no return and the returns to the other policy-holders are thereby pro tanto increased. This is clearly profit. The mere name "profits" used in this company's documents of course does not determine the point, but the real nature of the transaction must be looked at. The premiums do not lie in the company's till; they are sent to America and there

(1) 10 App. Cas. 438.

invested. A skilful and prudent investment results in an increase of the fund when valued at the end of the year, so that a fund which was say £100,000 by the contributions of the premiums has become £120,000 by the increased value of the stocks. The returns made to the contributors are so much more by reason of the increase in the values. On the other hand if the values decrease there is less to be returned. This disposes of the argument that the amounts returned cannot be profits because if they were a double contribution would make a double profit. Such a dealing with the premiums is trading and as such liable to income tax. Once shewn to be profits it cannot make any difference how the profits are distributed: *Mersey Docks* v. *Lucas* (1).

Finlay Q.C. in reply:—

The income derived from the investments is admittedly liable to income tax, and the case finds that that tax is paid. The rise in value in the stocks is not and never has been held to be "income" or profits. It is not necessary to impugn the decision in *Last* v. *London Assurance Corporation* (2). There it was held that what had "come in" was "income," though there was an obligation to return it. Here the so-called income has not been derived from outside sources; has not "come in." There has been no trade: a man cannot trade with himself. These members do not trade between themselves: they enter into a combination for mutual benefit.

The House took time for consideration.

July 1. LORD HALSBURY L.C.:—

My Lords, I think in this case the judgment should be affirmed.

I think the appellants do carry on a concern (I speak, of course, of that part of the concern which is under debate) which brings in profit. I am content myself with the test applied by the Earl of Selborne in the *Mersey Docks* v. *Lucas* (1), where it was said that the profits or gains of a concern mean, for the purpose of income tax, "the incomings of the concern after deducting the expenses of earning and obtaining them, before you

(1) 8 App. Cas. 891, 903, 904. (2) 10 App. Cas. 438.

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come to the application of them even to the payment of creditors of the concern."

My Lords, it is extremely difficult to test the question whether the moneys divisible at the end of the year are profits or not by analogous cases, since it is almost impossible to avoid introducing some phrase or adding some term which impliedly begs the question in debate. I am therefore a little jealous of saying that this thing is like some other thing, and then shewing that that other thing is not within the proposition necessary to support this judgment. If it were true that each individual of this concern did only subscribe what was supposed to be necessary to accomplish the desired object, and that either miscalculation or something else at the time of the original subscription made that subscription excessive, and that subsequent examination of the facts existing at the time of the original subscription shewed that subscription to be excessive, and that the individual subscriber got back his original subscription, and no more, or only such a sum as would make up the difference between his actual and what I will call his proper subscription, I could follow the argument. But I do not so understand the facts. The associated adventurers get their original subscriptions and something more; they get, even if they get no more, the enhanced value of their policy; and even if they got back only their own original premiums they would have got something in the nature of a more valuable contract than when they entered into it originally. But in truth they do get more; they get their proportionate share of the good trading or fortunate adventure which has taken place during the year, which consists in making contracts for the payment of large sums in the year which they have not been called upon to pay, and they have realized as profit something over and above what they have individually subscribed.

My Lords, I think this case is concluded by authority. I am quite unable to distinguish it from *Last's Case* (1). The distinction of fact simply consists in this, that people in the case before your Lordships entered into the transaction only with each other, a limited class, and not with what has been described as the outside public. I cannot see the difference.

(1) 10 App. Cas. 438.

Stephen J. I think quite accurately described this transaction as in the nature of a bet on the duration of life, and I think both decision and legislation justify the introduction of such a phrase into the argument; and if this be the real nature of the transaction it certainly seems to me to make no difference whether the members of the association make bets upon each other's lives or on the lives of people outside their own circle. An ordinary betting man's gains would be assessable, and they would not be the less so if his bets were confined to his own club or to an association whose rules excluded any bet except with a member of their own body.

Under the circumstances I am of opinion that the judgment ought to be affirmed.

LORD WATSON:—

My Lords, I am of opinion that the order appealed from ought to be reversed. It has been held, by both Courts below, that the present case comes within the principle of *Last* v. *London Assurance Corporation* (1), which is an authority binding not only upon them, but upon this House. I venture to think that the learned judges have either misapprehended the scope of the decision in *Last's Case* (1), or have failed to give due weight to the differences which exist between the circumstances of that case and the facts which we have to consider in this appeal.

The London Assurance Corporation was a proprietary office, or in other words the corporation and its shareholders formed a body quite distinct, in personality and in interest, from the insured. A member of the corporation might effect an insurance with it, but that circumstance could neither enlarge nor diminish his rights as a partner. The corporation, as a branch of its business, dealt in what are termed "participating" policies, which it issued to all persons, whether members or not, who had insurable lives and were willing to pay premiums on a higher scale than those charged for ordinary or non-participating policies. In consideration of these increased payments, the corporation undertook to return to the holders of participating policies, by way of bonus or abatement of premiums, two-thirds of any surplus funds

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applicable to such policies, which were to be ascertained and allotted every five years. The one-third retained by the corporation admittedly represented business profits, and it was not matter of dispute that the remaining two-thirds would also have been profits of the corporation except for its agreement to return that amount to the insured. The only point decided by the House was this, that the two-thirds of surplus payable to the insured did not constitute a proper debt of the corporation, falling to be deducted from receipts in ascertaining its trading profits, but was in reality a share of profits. In other words, this House held the agreement to be, in substance, an undertaking by the company to give the insured a proportion of its earnings.

The appellant company, so far as regards its membership, is constituted upon the principles of mutual assurance. The company issues life policies of two kinds, participating and non-participating; but the relations existing between the corporation and the two classes of insured differ materially. There are no shares and no shareholders, in the ordinary sense of the term; but each and every holder of a participating policy becomes, ipso facto, a partner of the company, with a voice in its administration, entitled to a share of its assets, and liable for all losses and expenses incurred by it. On the other hand, the holder of a non-participating policy is not a partner of the company; he is a creditor merely without any interest in its assets, and without any liability for its debts. The rate of premiums paid for participating is different from that which applies to non-participating policies, and is moreover not fixed, but fluctuating. A calculation is made of the probable disbursements of the company on account of expenses and other liabilities; and the amount claimed as premiums from policy-holders who are members is adjusted in conformity with that estimate. Then an account is annually taken of the transactions of the company, and the excess, if any, of premiums received from these members over expenditure for which they are responsible is, after carrying part to a reserved fund, returned or repaid to them, either in the shape of bonus additions to their insurances, or by a reduction of the future premiums required from them.

Besides issuing life policies, the appellant company insures without participation sums payable at fixed future periods, sells annuities, and has funds invested which bear annual interest. It is not disputed that, in so far as its transactions relate to non-participating policies, whether for life or for periods certain, and to annuities, the company carries on a trade in the same sense as any proprietary office does; or that surplus moneys arising upon these transactions are business profits, and as such are liable to income tax. With these profits and with the income derived by the company from its investments, we have no concern. This appeal is limited to the surplus arising upon its English transactions in participating or members' policies; and the question which we have to decide is whether that surplus represents "annual gains or profits" arising or accruing from a "trade carried on" by the appellant company within the meaning of Schedule D in the Income Tax Act of 1853.

The main and to my mind essential difference between *Last's Case* (1) and the present, consists in the fact that in this case the policy-holders are not outsiders, because they, and they alone, are members of the company. In *Last's Case* (1) the insured and the corporation stood to each other in no other relation than that of creditor and debtor; they were in all respects separate and independent bodies, without community of rights and interests, their sole connection being a right on the one part to pay premiums, with a counter obligation, when these had been duly settled, to pay the sum insured. A member had in that capacity no claim under his policy, and a policy-holder had, as such, no share in the receipts and assets of the corporation. But according to the constitution of the appellant company, insurance by means of a participating policy is the only possible qualification for membership; and, as soon as it is effected, the insured is invested with all the rights, and becomes subject to all the liabilities, of a partner. The individuals insured and those associated for the purpose of receiving their dividends, and meeting policies when they fall in, are identical; and I do not think that their complete identity can be destroyed, or even impaired, by their incorporation. The corporation is merely a legal entity which

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represents the aggregate of its members; and the members of the appellant company are its participating policy-holders.

When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits. That consideration appears to me to dispose of the present case. In my opinion, a member of the appellant company, when he pays a premium, makes a rateable contribution to a common fund, in which he and his co-partners are jointly interested, and which is divisible among them, at the times and under the conditions specified in their policies. He pays according to an estimate of the amount which will be required for the common benefit; if his contribution proves to be insufficient he must make good the deficiency; if it exceeds what is ultimately found to be requisite, the excess is returned to him. For these reasons I have come to the conclusion that the transactions of the appellant company, in so far as these relate to participating policies, do not constitute the carrying on of a trade, within the meaning of the Income Tax Acts, and that the surplus funds returned or credited to its members are not profits.

I move that the judgment appealed from be reversed with costs.

LORD BRAMWELL:—

My Lords, I am of opinion that this judgment should be reversed. The appellants do not carry on a profession, trade, employment, or vocation from which profits or gains arise or accrue within the meaning of the Income Tax Act. It is for the respondent to make out that they do. I think it can be shewn negatively that they do not. I speak, of course, of the mutual insurance business. They are a corporation, but the case may be, as is admitted, dealt with as though they were an unincorporated association of individuals. Take it that they were; take it that half-a-dozen persons so associated themselves at the

beginning of the year; they each put into a common purse £10, to be given to the executors of any one who dies, or divided, if more than one dies, among the executors of those having died. In fact, no one dies, and the money is returned, or carried on for the next year. Is it possible to say that this is an association for the purpose of profit, or that it has made any profit? But that, with less complexity, is the present case. Instead of six, there are many hundreds, perhaps thousands, associated; instead of the arrangement being for one year, it is for the respective lives of the associated; instead of all the subscriptions being given to the executors of one or more deceased, there is an agreed sum given to them, the rest being carried on to meet the case of future deaths, of which there will be a proportionate increase as the associates grow older. Instead of the money subscribed being returned, it is applied to the reduction of future payments by the associates, or to the increase of the sum they will be entitled to. It cannot be a profit if added to the sum insured, unless it would be if returned.

This was the way the case was put by my noble and learned friend, Lord Herschell. The same proposition is, in truth, in the argument of the appellants' counsel. That argument was, that there are no persons outside the associated members from whom an income is derived; that, therefore, there can be no profit except interest on investments, for which the appellants are liable to a tax, and which is not in question here; that, of course, if they thought fit to employ their surplus in trade, they would be liable to income tax on any profits they made, but as traders, not as an insurance association. Try the case as before. At the beginning of the year a man puts by £20. He is alive at the end of it; has he made a profit of £20? Suppose he has associated himself with others, and only £10 of his £20 have been wanted. Has he made a profit of £10? Who has made the profit if one has been made? Is it those who survive? Certainly not; because in insuring lives, the longer an insured person lives the less is the profit of the transaction to the insurers. Or is it the executors and administrators of those who have died who make the profit? But then they are not assessed. Take the case I put of the book-club; is the money not wanted a profit?

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I am of opinion, then, that as a matter of reasoning, the judgment is wrong. But it is said that we are bound by the authority of *Last* v. *London Assurance Corporation* (1) to hold otherwise. If I thought that that case decided otherwise, I would abide by it; it would be my duty to do so, and, I may say, my inclination, for it is much better that a wrong decision should be set right by legislation, than that idle distinctions should be made between it and other cases, and the law thrown into confusion. But I think that this case is not governed by that. I understand the principle of that decision to be, that there was a company making profits, meaning to make profits, not from its own members, but from those it dealt with; that although it returned two-thirds of those profits to those it dealt with, they were not the less profits, and that therefore income tax was payable on them. I thought, and still think, that wrong. I thought that the profits were only what remained, after the return they had agreed to make, on what was divisible among the shareholders. But whichever opinion is right, and it must be taken that the opinion of the majority was, it seems clear that it does not govern this case. There were in that case two bodies, the shareholders and the assured. The object of the former was to make profits in dealing with the latter, and as much profit as they could, giving them no better terms than were necessary to attract business. Here there is one body only, the assured, who are not dealing with another body, and are not to make profits, but to insure themselves and each other on terms as low as can be consistent with safety and solvency. In that case it was the insurers who were taxed; in this it is the assured. I think the cases wholly different.

LORD FITZGERALD:—

My Lords, it is essential to the decision of this appeal to unravel the tangle in which the constitution of the appellant corporation and their relation to their policy-holders seems to be involved. The foundation is the statute charter of the Nautilus Insurance Company, passed the 21st of May 1841, by which the stockholders of this company were incorporated for

(1) 10 App. Cas. 438.

marine and fire risks. I have not discovered in that charter, or in the charter of the Hamilton Marine Insurance Company, which is to a large extent incorporated with the Nautilus charter, any provision materially affecting the question before your Lordships.

The Nautilus was an ordinary marine insurance corporation and so continued to the 18th of April, 1843, when its charter was enlarged by giving it, "in addition to its existing charter rights, the privilege of organizing and doing business under the plan of mutual insurance, and for that purpose the corporation is authorized to have and enjoy a charter similar in every respect to that of the New York Mutual Insurance Company, passed the 12th of April 1842." The latter company was distinct from the appellant corporation, and does not appear to have been in any way connected with it.

We are thus thrown back on the charter of the New York Mutual Insurance Company, passed the 12th of April 1842, and I assume for the purposes of this appeal that the charter of the Nautilus Company is to be read as if the charter of the New York Mutual Insurance Company was incorporated in it in terms, save the parts specially excepted. The Nautilus corporation would thus, under its charter, whilst retaining its prior powers as a marine and fire company, obtain an extended authority "to make insurances on lives, and to make all and every insurance appertaining to life."

By clause 6 of the New York Mutual Insurance Company's charter which is incorporated in the Nautilus charter, "every person having taken a policy during the preceding year directly in his own name or in the name of his firm, and every person holding in his own name or in the name of his firm a certificate or certificates of the company (not discharged by payment of losses) for a proportionate share of the premium earned as hereinafter provided for, to the amount of $100, shall be deemed a member of the said company." It will be observed that this section does not appear to be expressly confined to participating policies.

By sect. 7 every person who shall become a member of this corporation by effecting insurance therein shall the first time he

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effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees, and no premium so paid shall be withdrawn from said company during its continuance, but shall be liable to all the losses and expenses incurred by the company during its charter.

By sect. 11 the officers of the company at the expiration of every year "shall cause an estimate to be made of the profits and true state of the affairs of the said company as near as may be for the preceding year, and shall thereupon cause a balance to be struck of the affairs of the company in which they shall charge each member with a proportional share of the losses of the company according to the original amount of premium paid by him, but in no case shall such share exceed the amount of such premium. Such member shall be credited with his proportionate share of the amount of premiums earned after deducting losses and expenses, and of the profits of the company derived from investments, which share of profits derived from investment shall be paid to such member, and for his proportionate share of the premiums earned he shall be entitled to a certificate on the books of the company of the amount remaining to his credit in the said company, such certificate to contain a proviso that the amount named therein is liable for any future loss by said company."

Next and last comes the Nautilus Insurance Amending Act of 1849, by which "that company is to be known thereafter as the New York Life Insurance Company." By sect. 2 the business of the said company shall be confined to insurance on lives, and it may make all and every insurance appertaining to life, and receive and execute trusts, make endowments, and grant and purchase annuities.

By sect. 5 the officers of this company within one month subsequent to the 1st day of January in each year shall cause an estimate to be made of the profits and true state of the affairs of the said company as near as may be for the preceding year, and all such dividends as may be declared by the trustees shall be placed to the credit of the persons entitled thereto on the books of the company; and each person so entitled may receive a certificate therefor. Such dividend certificates to contain a proviso that

the amount named therein is liable for any loss by said company. The trustees may at their discretion declare or pay interest on such certificates at a rate not exceeding six per cent. per annum, but no dividend shall ever be declared and payable impairing the capital or accumulation of the said company. I assume it is on the provisions of clause 5 that the annual estimate and division of profits is now made by the corporation.

Your Lordships have therefore to deal with a foreign corporation with its main business in New York, but having a place of business in London, and carrying on a portion of its business there. The business of that corporation is now confined to insurance business, appertaining to life, and including life annuities, and tontines or other endowments depending on life, or on some event appertaining to life. The life insurance business is again divisible into ordinary policies and participating policies, the holders of the latter becoming members of the corporation.

The corporation does by far the greater portion of its life insurance business under the plan of mutual insurance. I have not any information before me as to what the plan of mutual insurance may be, save as it is to be collected from the constitution and accounts of the corporation.

There are many insurance concerns in this country having the character, and some the appellation, of mutual. Probably the society that existed in Serjeants' Inn so far back as 1706 was the oldest; the Equitable is certainly one; and the annual return to the Board of Trade published by authority of Parliament will disclose a great number of others, some of which are not only mutual, but have long practised the plan of co-opting as members of the company those to whom they issue policies.

I conjecture the term "mutual" is applicable to cases where the members form a correlative or reciprocal relation to each other to become their own insurers, without the aid of capital, or stock, or shares. That common ground is reached in the present instance. The procedure is simple enough, though apparently complicated. It may be put thus: A., desiring to effect an insurance on his own life, applies for a participating policy, and, if on the inquiry his life appears eligible, and he pays the premium fixed by the rules of the corporation, and receives a policy,

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he thereupon fills a double capacity. First; he is an individual insured by the corporation; and, secondly, in respect to his policy, a member of the corporation with the privilege of voting. He continues so as long as he pays the annual premium, and does not forfeit his policy. The premiums he has so paid never come back to him wholly or in part, but must remain liable to all the losses and expenses incurred by the company during its charter.

The policy-holder gets in another shape what may be a profitable equivalent. At the end of each year the annual estimate is to be made of the profits and true state of the affairs of the company for the preceding year. In making this estimate, each member is to be credited, first, with his proportionate share of the premiums earned, after deducting losses and expenses; and, secondly, his proportionate share of the profits derived from investments: the latter is to be paid in cash. For his proportionate share of the premiums earned, he is to be entitled to a certificate on the books of the company of the amount remaining to his credit in the said company, such certificate to contain a proviso that the amount therein is liable for any future loss by the company. The amount so certified is not paid to the policy-holder, and may never be.

The case stated finds that the company does not pay the bonuses in cash, but the amount of the same is deducted from the next premium due, or is added to the policy. But at p. 34, it is stated more fully and more accurately: "The dividends of the company are declared in the form of reversionary additions to the policies. The amount of profits so appropriated among the policy-holders after the valuation of the 31st of December 1883, was £589,184 (cash value of same £327,325), distributed among 64,037 policy-holders, insuring £40,397,209."

There is some little obscurity as to the meaning of "the dividends of the company" in the passage last quoted, but probably it refers to each policy-holder's share of the premiums earned in the preceding year, and to be certified to his credit in the books of the company.

The form of the policy is annexed to the case stated, and seems to be an ordinary form. There is no contract expressed in

it as to membership, or as to any share of profits. It contains the ordinary contract on the part of the corporation to pay the sum insured in the event of the death of the assured, and special provisions as to forfeiture in case of misrepresentation, and as to lapse in the event of non-payment of the annual premium.

It is to be observed that the payment of the premium annually is a payment made on foot of the contract of insurance; that is its true foundation. If, for example, the insured, being assessed for income tax, claims under the 54th section of the Act of 1853, or the amending Acts, as one who had made insurance on his life to deduct the annual premium for such insurance from the amount for which he may be assessed, he would be entitled to such relief.

We have only to deal with the premium income of the company received in the United Kingdom, which according to the case stated is thus disposed of:—"out of the premium income received by the company in the United Kingdom claims under policies payable in the United Kingdom and the expenses of the company incurred in the United Kingdom are first paid and satisfied, and the balance is invariably remitted to the head office at New York, in which state the same is invested according to the terms of the company's charter in like manner as other income of the company."

It was urged before your Lordships that the balance of premiums received in the United Kingdom and so remitted to New York was eventually returned to the policy-holders in the United Kingdom, and ought not, therefore, to be considered as profits or gains of the corporation. My Lords, I can find nothing in the case to support this statement, and it seems to be contrary to the inferences to be properly deduced from the documents and accounts referred to in the case stated. The policy-holder does not appear at any time to get back or to receive, nor does he retain any right to any proportion of the premiums he has paid. He is to be credited each year with a proportionate part of the nett premiums gained in the preceding year, ascertained by a very complex and difficult calculation; but he does not receive that sum, and may never receive it. The practice seems to be to add a bonus to the policy, but subject to the liabilities of the

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corporation. It would be payable only on the dropping of the life. The right, such as it is, may be lost wholly or in part by failure to pay the annual premiums or to keep the policy in force, and if the policy-holder seeks to apply the bonus in part payment of premiums to become due, he can do so only by sacrificing about one-third of his bonus. Thus it appears from the tables annexed to the case, that if the reversionary bonus addition is £1 1*s.* 11*d.*, its cash value, if applied to the reduction of future premiums, is 7*s.* 4*d.*

Thus far, my Lords, my effort has been to ascertain, if practicable, the true position of the participating policy-holder in relation to the corporation. I have already pointed out that he fills two distinct capacities: first, as an individual assured by the corporation; secondly, as a member of the corporation by which he is assured.

What I have hitherto expressed, if it is of any importance, leads up only to the real question in the case, which is of importance, not by reason of the amount at issue, but of the very widespread result of a decision in one direction.

The Commissioners of Taxes were of opinion: "First. That no part of the premium income of the company received under participating policies is liable to be assessed to income tax as profits or gains chargeable under Schedule D to the Act 16 & 17 Vict. c. 34."

Is that opinion correct in law on the finding in the special case? Was the nett balance of such premium income, after deducting all costs and expenses, and so remitted to the head office in New York to be there invested, a part of the annual profits or gains of the corporation in respect of their trade or employment of an insurance company in the United Kingdom?

This question arises between the Crown and the corporation, and not between the Crown and the individual policy-holders, though it will, no doubt, affect their ultimate interests.

The language of Schedule D of the Act of 1853, "Annual profits or gains arising to any person whatever from any profession, trade or vocation exercised in the United Kingdom," must be read in connection with the 1st rule of Schedule D in the Act of 1842, "the duty shall be computed on a sum not less than

the full amount of the balance of the profits or gains of such trade, adventure, or concern on a fair and just average of three years, without other deduction than is herein-after allowed." "And shall extend to every person, body politic or corporate, fraternity, fellowship, company, or society, and to every art, mystery, adventure, or concern carried on in the United Kingdom."

Now, what are profits and gains of the concern? For an interpretation of these words we usually refer to *Mersey Docks* v. *Lucas* (1). The circumstances of that case are inapplicable, but the exposition of these words is conclusive. At page 903 Lord Selborne, in delivering the judgment of this House, says: "That proves distinctly that the word 'profits,' as here used, does mean the incomings of the concern, after deducting the expenses of earning and obtaining them."

And again, at page 905, on the word "gains," he says: "What are the gains of a trade? To my mind it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purpose it is used, whether it is gained for the benefit of a community or for the benefit of individuals."

And another of their Lordships is represented to have said (2): "The Income Tax Act does not speak of 'profit' received by any particular person or body for their own benefit, or that of any other person or body, or of its purpose or object or application, but simply of 'profits received therefrom,' and seems to use 'profit' in the sense of income acquired from the estate, of whatever character it may be, over and above the costs and expenses of receipt and collection."

It is not questioned that if the participating policy-holders in the case before us had not become members of the corporation, the balance of premiums would form part of the annual profits of the corporation, and as such be liable to be assessed to income tax. It is urged, however, that the fact that each participating policy-holder is to be deemed a member of the corporation makes the whole difference contended for. This is one of the inducements to outsiders to come in, as it is held out as a benefit that all the corporation may earn is to be mutually divided; but it is

(1) 8 App. Cas. 891. (2) 8 App. Cas. 912.

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not to be forgotten that the payment, when made to the representatives of policy-holders, is not to be made out of the premiums paid in by such policy-holders, but of the aggregate of the funds of the corporation derivable from all sources as may appear by the last annual estimate. The annual surplus, as well as the final aggregate of the funds of the corporation, must depend on the efficiency of working the corporation, the amount of business brought in, and the manner of doing it.

My Lords, we are now dealing with this case, not as between the corporation and the individual policy-holders who may happen to be members in respect of their policies, but as between the Crown in respect of a public general tax and the corporation as a trading concern, which it is indubitably. Is there, then, for the purposes of this appeal, any real difference between, first, the participating policy-holder in any other company, such as the London Assurance Company; and, secondly, the holder of a like policy in the New York Company?

In the first the policy-holder stipulates that a specified portion of the nett gains and profits shall be retained and added by way of bonus to the sum assured. In substance he may be regarded, to the extent of his interest, as a partner in the trading. The company is chargeable with income tax on the sum allotted as bonus. Why? Because it represents a part of the gains and profits of the company. In No. 2 the participating policy-holder, who is "to be deemed a member of the corporation" on paying the annual premium and keeping his policy unforfeited and alive, is to be entitled to an addition to the sum assured by way of reversionary bonus, ascertained and payable in the manner described. It seems to me that, whatever the difference, if any, may be, it is not favourable to the appellants.

As to this question, having given the fullest consideration to the arguments at the bar, and to the considered reasons of the noble and learned Lords who have preceded me, I am unable to see how in this particular case the fact of membership of the policy-holders can lessen the liability of the corporation to income tax on income earned in this country.

When I am unable to follow the clear and logical reasons of my noble and learned friend near me (Lord Bramwell), not the

less weighty because of their conciseness, I am satisfied that it must arise from my own deficiency in reasoning power.

Then if this nett balance of premiums is income of the corporation, the Queen's taxes on it cannot be affected by its future application. On this head Lord Selborne, at page 907 of *Mersey Docks* v. *Lucas* (1), says: "The mode of the application makes no difference whatever to the question of what is profit and what is gain." And Lord Blackburn, at page 910, puts it thus: "There is nothing in the nature of things, there is nothing in the words of the Act, to say that when an income has been actually earned, when an actual profit on which the tax is put, has been earned and received by any person or corporation, Her Majesty's right to be paid the tax out of it in the least degree depends on what they do with it afterwards."

Upon the whole, I am of opinion that the balance of what I may for shortness call the English premiums, so transferred to New York for the purpose of investment there by the corporation, formed part of the profit of the concern, and became liable here to income tax

I have, my Lords, thought it convenient to consider this appeal irrespective of *Last's Case* (2), and as if that case had not been decided. There is a distinction, in fact, between the two cases. In this case the policy-holders, on accepting their policies and paying the stipulated premium, become members of the corporation. In *Last's Case* (2) it was not so; there the participating policy-holder was an outsider. In my opinion that distinction creates no real difference. *Last's Case* (2) was in my judgment well decided, and in principle governs the case now before your Lordships.

I may observe, in conclusion, that a decision in the opposite direction places in the hands even of existing insurance companies the power by a stroke of the pen of exempting their future premium income from taxation. My noble and learned friend, Lord Bramwell, points out in *Last's Case* (2) that such would probably be the result, for he says: "As far as insurance companies are concerned, all they will have to do will be to alter their language."

(1) 8 App. Cas. 891. (2) 10 App. Cas. 438.

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LORD HERSCHELL:—

My Lords, in this case both the Courts below have given judgment for the Crown, on the ground that the question at issue was concluded by the judgment of this House in the case of *Last* v. *London Assurance Corporation* (1). By that decision your Lordships also are bound. It will be convenient therefore in the first place to ascertain precisely what was there decided, and upon what grounds the judgment proceeded, before calling attention to the facts of the present case. The London Assurance Corporation carried on the business of life insurance, receiving premiums, and in consideration of their undertaking to make payments at the death of the persons effecting policies with them. And its object was so to conduct that business as to earn profits for its members. But for the arrangement to which I will advert in a moment, the whole of the excess in any year of the receipts of the corporation beyond its expenses and the sum necessary to be added to its assets, in order that it might be in a position to meet the demands upon it, would have gone to the members of the corporation as the profits of the business carried on, and would have been, beyond question, properly so described and taxed. With the view, however, of attracting business the corporation undertook that there should be distributed to persons insuring with them two-thirds of the profits made, or that an equivalent addition should be made to the sum assured by their several policies. The question which fell to be determined was whether income tax was payable on so much of the "profits" as went to the policy-holders. It was contended that it was not, because the share of the "profits" which the policy-holders received was in fact a payment made in respect of a liability incurred for the purpose of inducing business, and was therefore to be regarded not as profits accruing to the corporation from the business carried on by them, but as an expenditure necessary for earning profit. The majority of your Lordships rejected this contention, holding that the entire surplus acquired by the corporation during the year constituted profits earned by it, and that the true view was that it had agreed to permit policy-holders to participate in and to take a share of these profits.

(1) 10 App. Cas. 438.

I turn now to the facts with which your Lordships have to deal. It appears from the case stated by the Income Tax Commissioners that the appellant company "has no shareholders, and that there are no shares. Each policy-holder is a member of the company, and is entitled to a share of the assets of the company and liable to all losses and expenses incurred by the company. A calculation is made by the company of the probable death-rate among the members of the company, and of the probable expenses and other liabilities of the company, and the amount claimed for premiums from the policy-holders is commensurate therewith." Every year the officers of the company compile an account of the income of the company arising from premiums and annuities, as well as from interest received and accrued. A corresponding account is taken every year of the expenses of the company arising from (1) claims by death; (2) payments of moneys assured to be paid on the arrival of a fixed period; (3) annuities payable; (4) payments for surrendered policies; (5) commission, medical fees, taxes, and expenses; (6) contingent sum set aside to answer any estimated depreciation in the valuation of securities. In explanation of the second and third items of this account it must be stated that the company, in consideration of single payments, grant annuities on lives, but neither the payment of these considerations nor the receipt of these annuities constitute a membership of the company. The company also, in consideration of fixed premiums, grant policies of assurance of a fixed sum on death or at a fixed period. The holders of such non-participating policies have no interest in the assets of the company, nor are the non-participating policy-holders members of the company.

It is not disputed that in so far as the company thus deals with those outside its own body it does carry on the business of insurance, and in respect of the profits made in this business is liable to income tax. But it was conceded by the Attorney-General on behalf of the Crown that for present purposes the company may be treated as if its operations were confined to the system of mutual insurance which constitutes the bulk of its transactions. He further conceded that the fact that the persons thus associating themselves together for the purpose of mutual assurance

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had been incorporated, was immaterial, and that the case might be treated as though it were an association of individuals unincorporated.

I think the Attorney-General was correct in thinking it immaterial that the persons thus associated had been incorporated, and that a legal entity had been created distinct from the members of which it was composed. This being so I shall, for the sake of simplicity, consider the questions that arise as though the association were unincorporated.

Before doing so, however, I must complete the statement of facts. The chief part of the surplus shewn by the accounts to which I have referred is paid, or, as the company alleges, is returned to the policy-holders (that is, to members of the company) as bonuses. The remainder of the surplus is carried forward as funds in hand to the credit of the general body of the members of the company. These bonuses are not paid in cash, but the amount of the same is deducted from the next premium due or is added to the policy. The only question raised by the case is whether the surplus, so far as the same is derived from the premium income received from members of the company in respect of their policies, is a profit or a gain of the company liable to be assessed to income tax under Schedule D of the 16 & 17 Vict. c. 34.

Let me now briefly summarize the facts in *Last's Case* (1) and those with which we have to deal. In the former, a company formed for the purpose of earning profits transacted its business by entering into contracts of assurance with persons entirely outside the company. In the assets of the company these policy-holders had no property, and they had no right to any share in its management. There existed in that case, beyond doubt, a corporation carrying on a trade from which profits or gains arose or accrued to it, the only controversy being whether, inasmuch as the corporation had agreed to permit those with whom it dealt to take a share of the profits, that part of the surplus income which was thus applied was to be regarded as expenditure for the purpose of enabling the corporation to earn profits, or as profits arising or accruing to it.

(1) 10 App. Cas. 438.

In the case before us certain persons have associated themselves together for the purpose of mutual assurance; that is to say, they contribute annually to a common fund, out of which payments are to be made in the event of death to the representatives of the persons thus associated together. These persons are alone the owners of the common fund, and they, and they alone, are entitled to the management of it. It is only in respect of his membership that any person is entitled to be assured a payment upon death.

I find myself unable to adopt the conclusion arrived at by the learned judges in the Court below, that these two cases are, so far as regards the question of liability to income tax, substantially the same. It appears to me that the distinction between them is substantial and important. Can it be said that the persons who are thus associated together for the purpose of mutual insurance, carry on a trade or vocation from which profits or gains accrue to them? I cannot think so. I am aware that the surplus income with which we are concerned is called "profits" in the documents of the appellants. But both the learned Lords who formed the majority in *Last's Case* (1) repudiated the idea that because moneys, which were not in fact profits, are erroneously so called, this would make them "profits" within the meaning of the Income Tax Acts. I entirely concur. We must look to see whether they are really so or not. Persons who agree to contribute to a common fund for mutual insurance, certainly would not in ordinary parlance be regarded as carrying on a trade or vocation for the purpose of earning profit. Let us see how the so-called profit arises. It is due to the premiums which the members are required to pay being in excess of what is necessary to provide for the requisite payments to be made upon the deaths of members, and not being, as the case states they were intended to be, commensurate therewith. This may result either from the contributions having, owing to an erroneous estimate or over-caution, been originally fixed at a higher rate than was necessary, or from the death rate being lower than was anticipated. Can it be properly said that, under these circumstances, the association of mutual insurers has earned a profit? The members contribute

(1) 10 App. Cas. 438.

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for a common object to a fund which is their common property; it turns out that they have contributed more than is needed, and therefore more than ought to have been contributed by them, for this object, and accordingly their next contribution is reduced by an amount equal to their proportion of this excess. I am at a loss to see how this can be considered as a "profit" arising or accruing to them from a trade or vocation which they carry on. It is true the alternative is allowed them of leaving the excess in the common fund, and so increasing their representatives' claim upon it in case of death, but I cannot think that this makes any difference.

Mr. Bremner truly pointed out that if these so-called bonuses were to be regarded as representing profits, it followed that if the premiums were trebled the profits would be increased in proportion. I will put it in another way. The grosser the miscalculation of what contributions were necessary to carry out the object of the association, and the higher the premiums which the members were accordingly called upon to pay, the greater would be the profits which they earned. Some fallacy must surely lurk in an argument which would lead to such a conclusion. I am, of course, limiting my observations to an association the funds of which are derived from and belong to the members alone.

My noble and learned friend, Lord FitzGerald, said in *Last's Case* (1), quoting the language of Lord Selborne in *Mersey Docks* v. *Lucas* (2), that "the gains of a trade are what is gained by the trading, for whatever purpose it is used." I entirely agree. Once shew that profits are made by trading and they are taxable, whatever the purpose to which they may be applied. But in the present case I cannot see that the income sought to be taxed is profit arising from trading. Lord FitzGerald further said in *Last's Case* (1), that we are bound to adopt the interpretation put upon "profits" in the Mersey Docks Case, as meaning "the incomings of the concern after deducting the expenses of earning them," or "income, of whatever character it may be, over and above the costs and expenses of receipt and collection." These definitions were, I doubt not, correct in relation to the facts of the Mersey Docks Case, and must be

(1) 10 App. Cas. 438, 450. (2) 8 App. Cas. 891, 905.

accepted for the purposes of any other case of a similar character. But I do not think they are applicable when dealing with a life insurance concern. It is of the very essence of such an enterprise that a portion of the income should from time to time be invested in order to create and maintain a fund capable of meeting the liabilities that have been and are being created. To treat and distribute as profits all the income in excess of the costs and expenses of receipt and collection would soon land such an undertaking in hopeless insolvency.

For the reasons I have given I think the judgment appealed from should be reversed.

LORD MACNAGHTEN :—

My Lords, in the argument on behalf of the respondent no stress was laid on the circumstance that the question which calls for decision has arisen between the Crown and an incorporated company. It happens here that the persons who combined to obtain the benefit of mutual insurance became, by the very act of insuring their lives, members of an incorporated company. But the company (so far as regards the participating policyholders) was not formed for the purpose of carrying on a business having for its object the acquisition of gain. The fact, therefore, that the insured, who are also the insurers, carry on their business through the medium of a company, was properly treated as immaterial. And yet I cannot help thinking that the difficulty in the case such as it is, has been caused by the existence of the company. Put the company out of sight altogether, and what remains? Certain persons agree to insure their lives among themselves, on the principle of mutual insurance. They take care to admit none but healthy lives. They contribute according to rates fixed by approved tables, and they invite other persons to come in and join them by insuring their lives on similar terms. The rates fixed by the tables are taken as being sufficient to provide for expenses, to meet liabilities, and to leave a margin for contingencies. What is to become of the surplus if everything goes right? The practice is to take an account every year of assets and liabilities, and to give the insured the benefit of the surplus, either by way of reduc-

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tion of premium or by way of addition to the sum insured. It can make no difference in principle whether the surplus is so applied, or paid back in hard cash. In either case it is nothing but the return of so much of the amount contributed as may be in excess of the amount really required. I do not understand how this excess can be regarded from any point of view or for any purpose as gain or profit earned by the contributors. I do not understand how persons contributing to a common fund in pursuance of a scheme for their mutual benefit—having no dealings or relations with any outside body—can be said to have made a profit when they find that they have overcharged themselves, and that some portion of their contributions may be safely refunded. If profit can be made in that way, there is a field for profitable enterprise, capable, I suppose, of indefinite expansion.

It was argued, however, that this case is governed by *Last* v. *London Assurance Corporation* (1). That, of course, is a binding authority. I quite agree that this House is bound not only by the case itself but by the principles necessary to its determination. But it seems to me that there is a very great difference between *Last's Case* and the present. There the insured were not members of the corporation. There the corporation was formed to carry on a business that had for its object the acquisition of gain by the corporation itself, as well as by the individual members. It was a trading concern. It made profits, and it divided profits among its members, though a large portion of the profits earned on participating policies was returned to the policy-holders. The promise of such a return was the attraction to a particular class of customers who brought profitable business to the concern. But it was held that the amount so returned could not be treated as an expenditure for the purpose of earning profits, and that income tax must be paid on all the profits earned by the corporation, however they might be dealt with afterwards. I do not think that that decision compels your Lordships to hold in a case like the present, where the business is a mutual undertaking pure and simple, that persons who contribute in the first instance more than is wanted, and then get

(1) 10 App. Cas 438.

back the difference, are earning gains or profits, and so liable to income tax.

I am therefore for reversal.

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Order of the Court of Appeal and Order of the Queen's Bench Division thereby confirmed, reversed: respondent to pay to appellants their costs below and in this House: cause remitted to the Queen's Bench Division.

Lords' Journals 1st July 1889.

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*

Solicitor for respondent: *Sir W. H. Melvill, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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JAMES M'CABE (PAUPER) . . . . . APPELLANT;

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND . . . . } RESPONDENTS.

Practice—Second Action for same Matter—Costs of former Suit—Staying Proceedings.

Where a plaintiff having failed in one action brings a second action for the same cause of action the second action must be stayed until the costs in the first have been paid. And this is the rule in Ireland, as in England. *Martin* v. *Earl Beauchamp* (25 Ch. D. 12) approved.

APPEAL from a decision of the Court of Appeal in Ireland.

The only question argued on this appeal was whether the appellant could be allowed to proceed with an action in the Chancery Division against the respondents without having paid the costs of a former action brought by him in the Exchequer Division against them for the same matter, in which judgment was given for the respondents. The facts are stated in the judgment of Lord Herschell.

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C. F. M. Mundy, for the appellant:—

The appellant has a good primâ facie case, and ought to be allowed to sue now in the Chancery Division, having been wrongly advised to bring his first action in the Exchequer Division.

[LORD HERSCHELL referred to *Martin* v. *Earl Beauchamp* (1).]

That case is no doubt a strong authority against the appellant, but it is a matter of discretion to allow him to try his case on the merits and in formâ pauperis.

Robertson Q.C. (of the Irish Bar) for the respondents was not heard.

LORD HERSCHELL:—

My Lords, this is an appeal from a judgment of the Court of Appeal in Ireland affirming a judgment of the Chancery Division. The appellant alleges that a certain amount of stock which was then standing in the name of John Glynn was in the year 1856 settled in some way or other upon the niece of John Glynn, who afterwards became the wife of the appellant. The wife died in the year 1866, and in March 1887 an action was brought by the appellant in the Exchequer Division in Ireland to recover from the Bank of Ireland the amount of stock which had so stood in the name of John Glynn, and, as he alleged, had been settled upon his wife, on the allegation that he as her representative had then become entitled to it. That action was tried before Chief Justice Morris and a special jury, and a verdict and judgment were given for the defendants. The costs were afterwards taxed at a sum of £32.

An action was subsequently commenced by the appellant in the Chancery Division of the same Court. He alleges that the former action was dismissed because it had been commenced in the wrong Division of the Court, it being a matter for the Chancery Division, and that he was ill advised in having brought it in the Exchequer Division. Upon that an application was made by him to be allowed to sue in formâ pauperis. A cross notice was then

(1) 25 Ch. D. 12.

given by the present respondents, praying that the action might either be stayed as frivolous and vexations and an abuse of the process of the Court, or that it might be stayed until the appellant had paid the costs of the first action. Upon those notices of motion coming on, the Master of the Rolls ordered that the petition for leave to sue in formâ pauperis should be dismissed and that the action should be stayed until the costs of the former action had been paid by the appellant. From that decision the case was taken to the Court of Appeal in Ireland, and the decision, after argument, was affirmed by that Court.

My Lords, I think that the judgment is really not open to objection of any sort. It was a matter within the discretion of the learned judge of the Court below, the Court of first instance, whether he would refuse or grant the permission to sue in formâ pauperis. He in the exercise of that discretion considered that it was not a case in which he ought to grant it. The Court of Appeal have concurred in that view, and I can see no reason to doubt that they acted with perfect propriety.

The only question remaining is whether the order was right in so far as it stayed the proceedings in the second action until the costs in the first action had been paid. Now, my Lords, I find that it was laid down in a recent case in the Court of Appeal, *Martin* v. *Earl Beauchamp* (1), that "the rule is established that where a plaintiff having failed in one action commences a second action for the same matter the second action must be stayed until the costs of the first action have been paid;" and even although the actions were not between precisely the same parties or persons suing in the same capacity, the case was held to be within the rule inasmuch as the plaintiff there was "suing substantially by virtue of the same alleged title." It cannot be denied that in the present case the parties are the same, and that the plaintiff is "suing substantially by virtue of the same alleged title;" and therefore I think that the present case has been properly disposed of in accordance with that rule, which I apprehend is not in any respect confined to the Courts in England but applies as well to the Courts in Ireland, arising as it does out of the inherent power which resides in the Court to prevent a second suit being

(1) 25 Ch. D. 12.

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brought upon the same cause of action until the costs incurred in the first action have been paid. It is impossible for us to interfere with that which the Court of Appeal have done, which was entirely within their jurisdiction, and which I can see no reason to doubt has been right.

My Lords, I come with the less regret to this conclusion because, as far as I can see, if the appellant here were allowed to sue he would really gain no advantage by doing so, for from all that I have heard to-day I have been unable to see that he would be likely to make out any sort of case against the present respondents, or to obtain any benefit from the litigation which he has commenced against them.

I move your Lordships that the appeal be dismissed.

LORD FITZGERALD :—

My Lords, I concur in everything which my noble and learned friend on the woolsack has stated, and I should only add, from my experience of the practice in Ireland, where I was for a long time upon the bench, that as long as I can recollect it has been part of the inherent jurisdiction, and never doubted, of every Court in Ireland to stay proceedings in an action before it, where a prior action has been brought substantially asserting the same rights against the same parties in the same or another Court, until the costs of that prior action have been paid. It was quite a matter of course, and a part of the jurisdiction of the Court, and never quarrelled with. That is exactly what the Master of the Rolls has done, and that is what the Court of Appeal has affirmed.

My Lords, I join with my noble and learned friend in saying that I concur in dismissing the appeal with the less reluctance because, having read carefully the whole contents of this book with the various conflicting statements put forward by the appellant, the plaintiff in the Court below, I cannot make out that he ever had the least shadow of claim as against the Bank of Ireland. If this stock was bound by a trust he may follow and assert that trust against the parties to whom that stock was transferred. It appears to have been transferred properly and regularly to the personal representatives of John Glynn, the

survivor of Owen Glynn and John Glynn, in whose names the stock stood. He may have that right—upon that I express no opinion—but against the Bank of Ireland he never had the shadow of a claim.

LORD MACNAGHTEN :—

My Lords, I concur.

Order appealed from affirmed; and appeal dismissed.

Lords' Journals 22nd July 1889.

Appellant in person.

Solicitors for respondents: *Freshfields & Williams, for Edward H. De Moleyns, Dublin.*

[HOUSE OF LORDS.]

THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY . . . . . } APPELLANTS;

AND

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF BURY } RESPONDENTS.

Railway Company—Highway carried over Railway by Bridge—Repairs of Roadway of Bridge—Obligation of Company—Railways Clauses Consolidation Act 1845 (8 *&* 9 *Vict. c.* 20), *s.* 46.

Where a railway crosses a highway, and the road is carried over the railway by means of a bridge in accordance with the provisions of sect. 46 of the Railways Clauses Consolidation Act 1845, the railway company are bound to keep in repair the roadway upon the bridge, such roadway being part of the bridge which by the section the company are to maintain.

The decision of the Court of Appeal (20 Q. B. D. 485) affirmed.

APPEAL from a decision of the Court of Appeal (1) in favour of the plaintiffs, the present respondents, upon a special case, the facts of which were in substance as follows:—

The plaintiffs were the urban sanitary authority of the borough of Bury in Lancashire. The defendants were a railway company whose special Acts incorporated the Railways Clauses Consolida-

(1) 20 Q. B. D. 485.

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tion Act 1845. The defendants had constructed under their special Acts a railway which crossed a turnpike road within the plaintiffs' district. The railway as it approached the road was in a deep cutting, and was carried under the road, the latter being supported by a bridge of two arches, through which the lines passed. The then existing level of the road was not altered by the construction of the railway and bridge by the company. No additional burden or expense was cast upon the plaintiffs or their predecessors in respect of the maintenance and repair of any additional length or width of roadway owing to the construction of the railway; or, in other words, if the line had never been constructed, the plaintiffs, or their predecessors, would have had to maintain and repair the identically same length and width of roadway.

The plaintiffs, having expended certain sums in the repair of the roadway upon the bridge, claimed to be repaid those sums by the defendants. The question for the Court was whether the defendants were liable under the provisions of the 46th section of the Railways Clauses Consolidation Act 1845 to keep the roadway of the said bridge in repair (1).

Sir *R. E. Webster* A.G. and *W. Graham* (*R. Henn Collins* Q.C. with them) for the appellants urged the same arguments and cited the same authorities as are set forth in the report of the decision of the Court of Appeal (2), and in addition cited *Reg.* v. *South Eastern Ry. Co.* (3) and *Great Eastern Ry. Co.* v. *Hackney*

(1) The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), enacts as follows:—

"And with respect to the crossing of roads or other interference therewith be it enacted as follows:—

"XLVI. If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company: provided always that with the consent of two or more justices in petty sessions as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level."

(2) 20 Q. B. D. 485.

(3) 32 L. T. (N.S.) 858.

Board of Works (1) per Lord Watson; and referred to 5 & 6 Wm. 4, c. 50, s. 21, and 33 & 34 Vict. c. 73, s. 12.

Sir *C. Russell* Q.C. and *R. S. Wright* for the respondents were not heard.

LORD HERSCHELL:—

My Lords, I am of opinion that this appeal should be dismissed and that the judgment appealed from should be affirmed.

The question turns upon the construction of sect. 46 of the Railways Clauses Act, the point involved being whether the appellant company are bound to maintain in repair the roadway passing over a bridge constructed by them under the authority of their special Act, which incorporated the Railways Clauses Act.

I think, my Lords, that there are reasons which should induce your Lordships to exercise very great caution before yielding to the argument of the learned counsel for the appellants. A construction was put upon the clause with which we are now dealing as long ago as the year 1858 by very learned judges in the Court of Queen's Bench (2). The view so taken was shortly afterwards approved and followed by the Court of Exchequer (3). And there are, as it seems to me, special reasons why a judgment so given should not be disturbed unless it be clearly shewn to have proceeded upon an erroneous view of the law, inasmuch as the clause which then received construction was contained in an enactment which did not of itself produce any legal results; it only had effect if incorporated by a subsequent Act of the legislature in statutes giving powers to railway companies; and one cannot but see that the construction put upon an enactment of that description may well have affected the action of the legislature in subsequent cases when they had to consider what obligations they should or should not impose upon the railway companies to whom they were giving powers. At the same time if it could be established that the decision was manifestly erroneous, your Lordships would be bound to give effect to that

(1) 8 App. Cas. at p. 691.
(2) *North Staffordshire Ry. Co.* v. *Dale*, 8 E. & B. 836.
(3) 5 H. & N. 160.

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view, and to hold that the statute must be construed according to its natural meaning, notwithstanding the interpretation which had so long ago been put upon it by eminent judges.

But, my Lords, when we come to consider the terms of the enactment, I myself see no reason to question the propriety of the decision which was pronounced by the Court of Queen's Bench so long ago, and which has been often followed since. I quite admit that a plausible argument has been advanced on behalf of the railway company by the learned counsel for the appellants, drawn from a consideration of the subsequent sections of the Act and of the circumstances arising when the road, instead of being carried over the railway by means of a bridge, is carried under the railway, the railway passing by means of a bridge over the road. It is suggested that there is no more reason why the railway company should be bound permanently to maintain the roadway in the one case than in the other. But I think that we have first of all to look at the language used in sect. 46, and to see whether, according to its natural meaning, apart from the other provisions of the Act, with which I will deal in a moment, the road which passes over the bridge is a part of the bridge within the meaning of sect. 46. It appears to me that, according to the natural use of language, it would be spoken of and considered as a part of the bridge, and I think that the Court of Queen's Bench were justified in saying that the language used was such as to create the obligation which is contended for on the part of the respondents.

But it is said that it is possible to construe the word "bridge" as excluding the highway passing over it, inasmuch as that distinction has been recognized in the Turnpike Acts which were in force at the time when this statute was passed. I quite agree that it is possible to do so, but I do not think that in the language of sect. 46 any such distinction is to be discovered, and it appears to me that the Court of Queen's Bench shewed good reasons why the legislature should not so have distinguished it in the present case. They pointed out that there would be an inconvenience, not only in the case of the bridge itself, but still more so in some respects in the case of the approaches, in having two different authorities to repair the structure of the bridge or the approach

and the road, inasmuch as it might, especially in the case of the approaches, often be a question of some nicety to determine how much was what is here called the approach and how much was the road upon the approach, between which the learned counsel for the appellants seek to make a distinction. And then too it may have been considered by the legislature that as a general rule, there being an ascent and a descent contemplated on either side of the bridge, the cost of repairs would be enhanced by the fact that the road passed over the bridge instead of passing in its former course, and that would be a reason for imposing this perpetual obligation upon the railway company.

It is said by the learned counsel for the appellants that similar reasons, at all events as regards the latter point, might exist where a road was to be carried under a bridge; and I quite admit that to be the case, but in such an enactment as the present I do not feel pressed by that argument, and for this reason, that all that the Railways Clauses Consolidation Act does is to lay down what one may call a general rule, which has no force or effect except in so far as that general rule is made effective by subsequent special legislation; and when you come to deal with the matter in the special Act, if in the particular case the general rule is not the best rule, or one which would be fair or just, it can be excepted or modified as the legislature may think fit; and, whether as regards the road under or the road over the railway, when the special Act is passed the legislature is not bound to incorporate in its exact terms the general provision relating to the one or to the other, but may make such special provision as it may deem suitable to the particular circumstances of the case. Therefore it seems to me that it is of very little force to shew that a different general rule has been laid down as regards roads over a bridge from that laid down in relation to roads under a bridge, because it may well be that whilst in the one case it was thought that in most instances it would be more just and convenient to leave the railway company to carry out the works of repair, in the other case it may not have been thought so.

My Lords, for these reasons I think that the proper construction has been put upon sect. 46 if one reads that section without

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reference to the other parts of the Act, and I find nothing in the other parts of the Act to justify a departure from its natural interpretation. I therefore move your Lordships that the judgment appealed from be affirmed and the appeal dismissed with costs.

LORD FITZGERALD:—

My Lords, I am of the same opinion. There appears to me to be no distinction in fact between the case now before your Lordships and the case which was decided thirty-one years ago in the Court of Queen's Bench, a decision subsequently adopted and universally acted upon down to the present time. To disturb a decision of that kind we should require to be satisfied that there was some cardinal error connected with it, and I am not satisfied at all that there is any error; on the contrary, forming the best opinion that I can, I should say that the decision of the Court of Queen's Bench in 1858 was a decision according to law, according to the true interpretation of the 46th section of the Act. It might have been very convenient indeed at the time when this Act was framed to have established one general rule if it was consistent with its provisions, namely that when the railway company had given back the road into the hands of the county authorities unaltered in its character, repaired and made perfectly fit for use, the expense of repairs should afterwards rest with the latter body; but the statute does not say so, the decisions are to the contrary, and I adhere to the decision of the Court of Queen's Bench.

LORD MACNAGHTEN:—

My Lords, I am of the same opinion.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 25th July 1889.

Solicitors for appellants: *Clarke, Woodcock & Ryland, for C. Moorhouse, Manchester.*

Solicitors for respondents: *Andrew, Mellor & Smith, for J. Haslam, Bury.*

[HOUSE OF LORDS.]

NEWBOULD . . . . . APPELLANT; H. L. (E.)

AND 1889

SMITH AND ANOTHER . . . . . RESPONDENTS. *July* 26.

Limitations, Statute of—Evidence—Entry against Interest—Payment of Interest—Agency.

The decision of the Court of Appeal as to the equitable mortgage (33 Ch. D. 127) affirmed, not for the reasons given by that Court, but because, without pronouncing any opinion on the question arising under the Statute of Limitations and assuming the entry in question to be admissible, there was no evidence to connect the entry with the property in question.

APPEAL from a decision of the Court of Appeal (33 Ch. D. 127).

As will be seen from the report their Lordships gave no decision on any point of law, but based their judgments entirely on the facts, which sufficiently appear from the speeches of Lords Herschell and Macnaghten.

July 25, 26. *W. Barber* Q.C. and *C. Gould* for the appellant were directed to confine their arguments as to the Montague Street property to the question whether assuming the entry in question to be admissible it could be connected with the payment of interest on the mortgage, and contended that it could be so connected.

Warmington Q.C. and *Yarborough Anderson* for the respondents were not heard.

LORD HERSCHELL:—

My Lords, this is an action brought by the appellant, Elizabeth Newbould, who was the administratrix of her late brother, John Newbould, to enforce a security to which she claims to be entitled as against property belonging to the defendants. The principal defendant, Charles Edward Smith, died very shortly

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after the action was brought. The other defendants claim to be entitled to the property over which the appellant seeks to enforce her alleged security.

It appears that in the year 1863 Charles Edward Smith, the deceased defendant, purchased some property in Montague Street, Sheffield, which was held under a lease granted by Dr. Chadwick. It would seem that for the purpose of paying the purchase-money he had borrowed from the late John Newbould, who was a solicitor and who acted as his solicitor in relation to this purchase, the sum of £350. In respect of this it is said that he left with John Newbould, as the security for this advance, the title-deeds relating to the Montague Street property, and thus created an equitable mortgage upon that property. I will assume, for the purposes of the opinion which I am about to express to your Lordships, that such was the case, and that the title-deeds continued to be held by John Newbould as the security for this advance of £350.

In the month of July, 1878, the property over which this security was given was assigned by Charles Edward Smith to the other defendants.

It is admitted that unless the payment of interest upon this loan is proved by an entry to which I will call attention in a moment there has been no payment of interest since the 12th of February 1866, or at all events that there is no evidence of the payment of any interest or any payment on account after that date. In short, it is not disputed that the Statute of Limitations has run and has barred this action unless there is evidence afforded by the entry to which I have referred that interest was paid upon the loan on the 10th of September 1878. In a diary kept by Mr. Newbould there appears on that day an entry acknowledging the receipt by him from Charles Edward Smith of £50 "on account of rent and interest." The question has arisen whether that entry is admissible in the present action as against the defendants, as being an entry made by John Newbould against his interest, and therefore after his death admissible in evidence. I will assume for the purposes of the case that it was properly admitted. The question then is, Does that entry establish that on the 10th of September 1878 a payment was

made on account of interest upon this loan of £350 by Charles Edward Smith?

Now the entry itself merely refers to £50 as paid "on account of rent and interest;" it does not define what rent or what interest. It is said that, as far as appears, the only rent which was likely to be payable from Charles Edward Smith through the hands of John Newbould was rent due to Dr. Chadwick, and that inasmuch as evidence was offered to shew that at that time Dr. Chadwick was entitled to a sum not exceeding about £30 for rent from Charles Edward Smith, it is to be assumed that the balance of £20 was paid on account of interest. I will take that to be the case. But then the question is, on account of what interest? The £30 which was paid on account of rent was, it is admitted, not paid on account of rent due to Newbould. There is therefore no reason for supposing that the remaining £20 which was paid on account of interest was any more paid on account of interest due to Newbould. It may have been; equally it may not have been. We have no record of any transaction between Newbould and Smith, except this entry, after the month of February 1866. At that time there seems to have been a settlement of account which cleared off all the balance due from Smith to Newbould except the sum of £350; but after that date there is not to be found in Newbould's books a record of any transaction between him and Smith; he is not debited with this interest, nor with any sum as due from him to Newbould, nor does Newbould credit him with any payment.

Can it be said under these circumstances that it is proved that this payment was on account of interest due on this £350 to Newbould, especially when we know that at this very time Newbould was collecting interest upon mortgage debts due to other people, especially to the Misses Alderson, to whom a sum of interest was or may have been on that date just as much due as it was to Newbould himself, there being nothing to shew or to render it more probable that the payment of interest made on that date was a payment on account of interest due to Newbould than that it was a payment to him as agent collecting interest due to the Misses Alderson? And I apprehend that if a fact proved be as consistent with one hypothesis as with another, it

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cannot be said to establish either. I do not know, indeed, that the case might not be put more strongly even than that, because, although the mortgage to the Misses Alderson is, as far as we are aware, the only transaction which was then current, yet, in the absence of any information, and both the parties being dead, it is impossible to say what transactions there may have been between them, or in what other cases Mr. Newbould may have been an agent to collect interest for other people, just as he was agent to collect interest for the Misses Alderson.

It therefore appears to me to be clear that, assuming this entry to have been properly admitted in evidence, it does not prove that which it is essential for the appellant to prove in order to maintain her action and to enforce her security against the Montague Street property.

That, my Lords, is all I need say to dispose of that part of the case. But in the Court below Cotton L.J. based his judgment upon another ground; he said: "In my opinion, even if in fact there was a sum paid here in respect of interest on this mortgage by Charles Edward Smith, that would not be sufficient to prevent the statute running in favour of those to whom, previously to this time, he had transferred the property. It is said that he had assigned it subject to the mortgages and charges thereon. That is so; but that does not make him an agent of those to whom he has transferred it to pay." That no doubt raises a serious question, and one of general importance. It is a matter which one would desire to hear fully argued before pronouncing any opinion upon it; but as it appears to me, in the view which I take of the evidence, not to arise in this case, I think it would be improper for me in any way to deal with it. All that I will say is this, that inasmuch as I do not consider that it arises, and we have consequently not heard argument upon it, that having become unnecessary owing to the view which I think all your Lordships have taken, I must not be considered as in any way affirming or giving my adhesion to that proposition, or indeed as expressing an opinion upon it at all one way or the other.

My Lords, the only remaining question is, whether the appellant can enforce her security as against another property, which has been called the Franklin Street property. It appears that

this property was purchased by the defendant Charles Edward Smith, and that on the 16th of April 1863 he mortgaged it to two ladies named Alderson for the sum of £600, at 5 per cent. interest. Mr. Newbould acted as the solicitor for both parties in that transaction. I ought to add that the interest upon that loan appears to have been paid in the years 1864, 1865, and 1866 by John Newbould to the Misses Alderson, and I think that the ledger which has been admitted affords evidence that the sums so paid by Newbould to the Misses Alderson were advanced by him by way of loan to Charles Edward Smith, and repaid upon a general settlement of account in the month of February, 1866. But from that date there is no evidence of any payment whatsoever having been made by or on behalf of Charles Edward Smith to the Misses Alderson. Mr. Newbould appears to have continued, down to the time of his death, to pay interest to the Misses Alderson, and he died in the year 1880; but there is no evidence, unless it be afforded by the circumstances to which I have called attention, that he made those payments as an agent for or on behalf of Charles Edward Smith. He was the solicitor of the Misses Alderson; he was their agent to collect the interest, and he undoubtedly made payments of interest from time to time to them as from a number of persons from whom it was his duty apparently to collect the interest; but there is no evidence whatsoever that he made those payments as the agent for Charles Edward Smith. It is admitted that unless that fact be established, the Statute of Limitations bars this claim also, and I have nothing to add to what was said in the Court below upon this point beyond that which I have submitted to your Lordships. It appears to me clear that it would be straining the evidence beyond all reasonable limits if you were to hold it proved that the payments were made by John Newbould as agent for Charles Edward Smith.

Upon these grounds I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD FITZGERALD:—

My Lords, I concur in the judgment which has been announced by my noble and learned friend. There are some propositions

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in the judgments of the Primary Court and of the Court of Appeal which I am not to be taken as adopting or expressing any opinion upon.

LORD MACNAGHTEN:—

My Lords, I quite agree that this appeal must be dismissed, upon the simple ground that the appellant has not adduced any evidence upon which a Court of Justice could safely act.

As regards the claim on the Montague Street property, the learned counsel for the appellant were invited to direct their attention to the question as to the effect of the entry of the 10th of September, 1878, assuming it to be admissible. On that assumption, there is, of course, a record of payment, partly on account of interest, by Smith to Newbould. It appears to me to be the merest guesswork in the world to connect that payment with the payment of interest in respect of the debt alleged to be due from Smith to Newbould upon the Montague Street property. If I were to speculate upon the matter I should rather be disposed to connect it with the Alderson debt.

As to the claim on the Franklin Street property, I agree that there is no evidence whatever to shew that Newbould was agent for Smith after the year 1866.

With regard to the important point on which the Court of Appeal principally founded their judgment, I desire to say that I express no opinion upon it.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 26th July 1889.

Solicitors for appellant: *Geare, Son & Pearse.*
Solicitors for respondents: *Munton & Morris.*

[HOUSE OF LORDS.]

SOPER (PAUPER) . . . . . APPELLANT;

AND

ARNOLD AND ANOTHER . . . . . RESPONDENTS.

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July 30.

Vendor and Purchaser—Rescission—Forfeiture of Deposit—Defect in Title subsequently discovered—Common Mistake—Action to recover Deposit.

The conditions in a contract of sale of land provided that the purchaser should pay a deposit, and that if he failed to comply with the conditions the deposit should be forfeited and the vendors should be at liberty to resell. The purchaser paid the deposit, and accepted the title, but when the time for completion arrived he could not provide the residue of the purchase-money. The vendors thereupon gave the purchaser notice that the contract was rescinded and the deposit forfeited. Three years afterwards, the vendors having contracted to sell to another purchaser, it was decided that their title was bad, owing to a defect which had appeared upon the face of the abstract delivered to the first purchaser. The first purchaser thereupon brought an action to recover his deposit on the ground of mutual mistake and failure of consideration:—

Held, affirming the decision of the Court of Appeal (37 Ch. D. 96), that the title having been accepted, and the deposit having been forfeited solely in consequence of the purchaser's default, he was not entitled to recover the deposit.

APPEAL from a decision of the Court of Appeal (37 Ch. D. 96).

In November 1882 the respondents, who were trustees under the will of B. A. Arnold, contracted to sell to the appellant certain freehold hereditaments at the price of £6100, £610 to be paid on signing and the residue on completion. The conditions of sale provided that if the purchaser failed to comply with the conditions the deposit should be forfeited to the vendors, who should be at liberty to proceed to another sale. The appellant paid the deposit of £610. The title was approved and accepted by the appellant's solicitor, but when the time for completion arrived the appellant was unable to provide the residue of the purchase-money. In consequence of this default the respondents in March 1883 (with notice to the appellant) rescinded the contract and declared the deposit to be forfeited.

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In 1885 the respondents contracted to sell the property to another purchaser, who took an objection to the title on the ground that the trustees of Mr. Hoare's will (who had sold the property to Mr. Arnold) had not an absolute power of sale. Chitty J. decided that this objection was well founded, and the sale went off. The terms of the power of sale under Mr. Hoare's will had appeared upon the face of the abstract delivered to the appellant in 1882.

In 1886 the appellant brought an action against the respondents to recover back the deposit on the ground of a mutual mistake of fact and failure of consideration. Kekewich J. gave judgment for the defendants (1), and this decision was affirmed by the Court of Appeal (Cotton L.J. Sir J. Hannen, and Lopes L.J.) (2).

Against these decisions the plaintiff appealed.

July 29, 30. *J. M. Rigg* (*J. A. Thorne* with him) for the appellant:—

This is a case of a common mistake. The purchaser and vendors both supposed that the vendors had a good title, when in truth they had none. The purchaser on discovering this is not bound to complete and can recover back his deposit: *Cooper* v. *Phibbs* (3), per Lord Westbury. Equity will relieve (even in the case of a completed contract) against a common mistake without fraud: *Jones* v. *Clifford* (4); *Bingham* v. *Bingham* (5).

In *Want* v. *Stallibrass* (6) the argument of the plaintiffs' counsel was apparently adopted by Martin and Pollock BB. A vendor who describes his property as a freehold—that is the fee simple—not having such an estate to sell, commits a legal fraud and will be decreed to repay the deposit, even after conveyance: *Hart* v. *Swaine* (7). The observation of Lord Selborne in *Brownlie* v. *Campbell* (8) as to the doctrine of Scotch law is only obiter dictum as to English law.

(1) 35 Ch. D. 384.
(2) 37 Ch. D. 96.
(3) Law Rep. 2 H. L. 149, 170.
(4) 3 Ch. D. 779.
(5) 1 Ves. Sen. 126; Belt's Suppt. p. 81.
(6) Law Rep. 8 Ex. 175, 184, 185.
(7) 7 Ch. D. 42.
(8) 5 App. Cas. at p. 937.

W. Barber Q.C. (*Vernon Smith* and *Reginald Kemp* with him) for the respondents:—

The title whether really defective or not—and it must for the purposes of this appeal be taken to be defective—was accepted by the appellant with knowledge of the defect, if it was one. If the vendors had filed a bill for specific performance the Court would not have gone into the question of title after the time had passed and the title had been accepted: the vendors would have been entitled to a declaration to that effect in their order for specific performance. After conveyance there is no jurisdiction to set it aside except in "the case of misrepresentation and fraud, or an error in substantialibus sufficient to annul the whole contract;" *Brownlie* v. *Campbell* (1), per Lord Selborne. The deposit is a guarantee for the completion of the contract: *Ex parte Barrell* (2); *Howe* v. *Smith* (3). The cases relied on by the appellant are clearly distinguishable. Here the purchaser had put an end to the contract by his own default. [He also cited *Rogers* v. *Ingham* (4); *Stewart* v. *Stewart* (5).]

Rigg replied.

LORD HERSCHELL:—

My Lords, the only question raised by this appeal is whether the appellant is entitled to recover from the respondents a sum of £610 which was paid to them some years ago, as a deposit upon a contract of sale made between the appellant and the trustees of the will of Mr. Arnold, whereby the trustees agreed to sell certain property to the appellant for the sum of £6100. By the conditions of sale it was provided that "all objections and requisitions (if any) in respect of the title or the abstract, or anything appearing therein respectively, shall be stated in writing and sent to the vendor's solicitor within seven days from the delivery of the abstract, and all objections and requisitions not sent within that time shall be considered to be waived, and in this respect time shall be deemed the essence of the contract."

(1) 5 App Cas. at p. 937.
(2) Law Rep. 10 Ch. 512.
(3) 27 Ch. D. 89.
(4) 3 Ch. D. 351.
(5) 6 Cl. & F. 911.

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An abstract was delivered by the trustees to the appellant. That abstract disclosed that Mr. Arnold had purchased from the trustees of the will of Mr. Henry Hoare, and that those trustees had purported to sell to Mr. Arnold under the authority of a power contained in the will. The abstract disclosed the terms of the will—it shewed exactly the terms of the power which the trustees had purported to exercise in selling. The solicitors of Mr. Soper, the purchaser, made certain requisitions and objections. Some of the objections indeed were connected with the fact of the sale having taken place by the trustees of Mr. Hoare under the powers of his will; but they took no exceptions to the title except such as were removed to their satisfaction, and ultimately they accepted and approved the title. That fact is distinctly stated in the statement of defence to the action and is not traversed in the reply; and therefore we may take it, indeed we are bound to take it, that the title was so accepted and approved.

Thereupon a conveyance would have followed in the natural course, but the appellant, as is admitted, was unable to find the balance of the purchase-money, and for that sole reason the payment of the balance was not made, and the transaction was not carried through by a conveyance and the payment of the purchase-money accordingly. The time having elapsed within which the payment was to be made, the vendors served a notice upon the appellant that unless he paid the money in accordance with the contract within fourteen days they should rescind the contract and not be under any further obligation to carry it out and complete the purchase. No payment was made, nothing was done, and matters remained in that position, the deposit continuing to be held by the respondents.

So matters stood for some years until the present action was brought, in which the appellant seeks to recover back the money which he so paid, upon the ground that the trustees of the will of Mr. Henry Hoare had not power to sell the estate except upon a condition which had not happened. It must be taken I think for the purposes of this appeal that the trustees had not the full power of sale which they purported to exercise, that their power was only exercisable absolutely in case there were no children of

the marriage who could become entitled to the property under the trusts of the will; and it appears that there is a daughter of the marriage, who on her majority will become entitled under those trusts. There was, therefore, the plaintiff insists, the defect in the title to which I have called attention; and his point is this: he says, "Inasmuch as I now discover that at the time when I paid the deposit on the sale and at the time when I failed to pay the residue of the purchase-money and you declared the contract to be at an end, you, the vendors, could not have made out a good title to the property, therefore I am entitled to have my deposit back."

Now, my Lords, as I have pointed out, the defect, such as it was, was communicated, on the very face of the abstract of title, to the appellant and was as well known to him as to the trustees at the time when he accepted and approved the title. There can be no doubt that if he had possessed the money and had been in a position to pay it, the residue of the purchase-money would have been paid and a conveyance executed notwithstanding that defect. I apprehend that it is clear that if that had taken place no objection could afterwards have been taken to the title such as is now suggested, and no relief could have been obtained on account of the defect to which I have alluded. How does the matter stand, then, with regard to the deposit? The deposit is given as a security for the performance of the contract. The appellant admittedly cannot recover that deposit if it was through his default that the transaction was not completed. And, under the circumstances which I have detailed, I cannot doubt that it must be regarded as a contract uncompleted through the default of the appellant. As I have said he took no exception to the title—he was willing to take that title—he had intimated his willingness to take it by accepting and approving of it, and the vendors were ready and willing to convey to him that title which he had so intimated his willingness to accept. But he, although he did not object to the title at all, was not prepared to carry out his contract, he had not the means, and that became known to the vendors. Thereupon they, after due notice, determined the contract as against him.

Now, my Lords, when an action is brought by the appellant

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to recover the deposit and the objection is taken that the vendors were not able to make out what is in law a complete and perfect title the answer seems to me to be this, that the vendors were perfectly ready and willing to convey to the appellant that title which he had accepted and approved and declared himself willing to take, and the contract only went off because he afterwards was not in a position or prepared to carry it out on his part. That seems to me to shew that it was owing to his default that the contract came to an end; and I venture very much to doubt whether, under circumstances such as I have described, if the vendors had brought an action for specific performance to compel him to complete the purchase and to pay the residue of the purchase-money, he could have resisted such an action on the ground, even if he had then ascertained the fact, that there was some defect in the title. No authority has been cited to shew that under such circumstances, where a purchaser has accepted and approved a title, all the facts being known to him at that time, he can resist a decree for specific performance and claim to have the title investigated. If that be the case, it seems to me that it would be out of all reason to suppose that he could recover the deposit on the ground that the contract had come to an end not through his default but through that of the vendors when the circumstances were such that they could have compelled him specifically to perform the contract. But I do not think it necessary to determine this point, because for the reasons which I have stated it seems to me that he was in default, that the contract went off owing to his default, and that under those circumstances he cannot recover the deposit. Any other decision would lead to most inconvenient consequences, because under circumstances such as these, where trustees were selling, the deposit might have been distributed by them amongst their beneficiaries, and yet at any time within six years afterwards if the purchaser discovered that there was some defect which would have prevented their making out a perfect conveyancing title he could bring an action against the trustees to recover back the deposit which he had so paid though he had accepted and never taken any objection to the title. That would be a result which would be productive of the gravest inconvenience. I

know of no authority in point of law to warrant it, and I therefore move your Lordships that this appeal be dismissed.

LORD FITZGERALD:—

My Lords, I have, during the course of this rather singular and unusual case, had upon my mind a considerable degree of hesitation in affirming the judgment of the Court below; but a great deal of it has been removed by the argument which Mr. Barber has addressed to us. Therefore I am able to say that I do not dissent from the judgment which has been announced by the noble and learned Lord on the woolsack—nay more, that I concur in it.

LORD MACNAGHTEN:—

My Lords, I certainly mean no reflection on the learned counsel for the appellant, who has argued the case with perfect fairness and much ability, when I say that the appellant's claim seems to me to be groundless and almost absurd.

There was a contract for the sale of some real property. There were the usual conditions of sale. There was a deposit paid, and there were the ordinary provisions as to the forfeiture of the deposit. An abstract was delivered; the vendors' title was fully disclosed; that title was duly accepted and approved; the conveyance was prepared, and everything seemed ready for completion; but when the time came for paying the price the balance of the purchase-money was not forthcoming. The purchaser had to abandon the contract; the deposit was forfeited, and the matter was apparently closed. Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.

Some years afterwards there was a contract to sell the property to some one else, and that person found out a flaw in the title

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which in the opinion of a learned judge prevented the vendors from enforcing the contract. The appellant now comes forward and says: "Give me back my money, because if I had found out that flaw I should not have allowed my money to be forfeited." I am not sure that every judge would have taken the same view of the construction of Mr. Hoare's will that Chitty J. took; but I express no opinion upon that, and I assume that this flaw was a fatal defect in the title.

The real answer to the claim of the appellant I think is that the deposit was forfeited for a good and sufficient reason. It was forfeited because the purchaser could not pay the stipulated price and for no other reason. If instead of forfeiting the deposit the vendors had brought an action for specific performance after the purchaser had accepted and approved the title, as it is admitted he did, they would I think have been entitled to a judgment for specific performance with a declaration that the title had been accepted, and I apprehend the Court would have declined to go into any question as to the construction of Mr. Hoare's will. Under these circumstances in my opinion it would be most inequitable to allow the appellant to re-open the matter.

Judgments appealed from affirmed and appeal dismissed.

Lords' Journals 30th July 1889.

Solicitors for appellant: *Granville Smith & Co. for T. & J. Hutchings, Teignmouth.*

Solicitors for respondents: *Lovell, Son & Pitfield.*

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DAVID LYELL . . . . . APPELLANT;

AND

JOHN LAWSON KENNEDY. . . . . RESPONDENT.

JOHN LAWSON KENNEDY . . . . . APPELLANT;

AND

DAVID LYELL . . . . . RESPONDENT.

*Limitations, Statute of—Action to recover Land—Possession of Heir-at-Law—Receipt of Rents by Agent—Agent and Receiver—Agent de son Tort—Ratification by Owner—Trustee—*3 *&* 4 *Will.* 4 *c.* 27 *ss.* 8, 9, 34—37 *&* 38 *Vict. c.* 57 *s.* 1—*Evidence—Hearsay Evidence—Parish Registers, Admissibility of—Public Duty to keep Registers—Pedigree—Proceedings between Strangers, Admissibility of—Declarations of deceased Relatives—Res inter alios actæ.*

During the life of D., owner in fee of land which was let to tenants from year to year and week to week, the property was managed by the defendant as her agent, the defendant receiving the rents and paying them into a separate ear-marked account at his own bank. D. having died intestate in 1867, the defendant continued to receive the rents and pay them into the bank exactly as before, not informing the tenants of D.'s death, but stating to several persons that he was acting as agent and receiver for the true heir whoever he might be. The defendant thus acted till 1880, when, more than twelve years having elapsed after D.'s death, he claimed the property on his own account. The assignee of D.'s heir having in 1881 brought an action against the defendant to recover possession of the land and for an account of the rents and profits:—

Held, reversing the decision of the Court of Appeal (18 Q. B. D. 796) and restoring the decision of Stephen J., that as to the land the acts of the defendant in receiving the rents as agent for the heir could not dispossess the heir so as to put him to his action under ss. 2 and 3 or s. 8 of 3 & 4 Will. 4 c. 27; that the defendant's acts as such agent though unauthorized might be ratified by the true owner, and were ratified by the plaintiff bringing his action within a reasonable time after the heir was ascertained: that as to the accumulated rents and profits the defendant had made himself a trustee; that the action was not barred by the Statutes of Limitation; and that the plaintiff was entitled to judgment for the recovery of possession of the land and to an account of the rents and profits since D.'s death.

Scotch parish registers or certified extracts from them, receivable in Scotch Courts as kept under the sanction of public authority, are receivable in English Courts as to matters properly and regularly recorded in them.

Proceedings in a Sheriff's Court in Scotland held admissible as to matters

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of pedigree, on the same principle on which answers and decrees in Chancery have been admitted by the House in Peerage Cases, the facts of the pedigree not being in dispute but only incidentally stated in the proceedings.

APPEAL and cross-appeal from a decision of the Court of Appeal (1).

The present action was brought by Lyell against Kennedy to recover possession of certain hereditaments at Manchester, and for an account of the rents and profits. The allegations in the statement of claim appear in the report of the decisions below (1).

At the trial before Stephen J. without a jury in June 1886 the following facts appeared:—

On the 5th of November 1867 Ann Duncan died intestate as to the hereditaments in question of which she was owner in fee simple, and which were in the possession, as to part, of a tenant from year to year, and as to the rest of weekly tenants, and without any lease in writing. This property Ann Duncan took as devisee of Lawrence Buchan, whose executors were Ann Duncan and Kennedy. During the life of Ann Duncan (who lived in Scotland) Kennedy managed the property in the name of "the executors of Lawrence Buchan," so entitling the receipts for rent which he gave the tenants and a separate account at his own bank in Manchester into which he paid the rents. After Ann Duncan's death and until 1880 Kennedy continued to manage the property exactly as before, giving receipts and paying in the rents under the title of "the executors of Lawrence Buchan," the tenants (as far as appeared) not being informed of Ann Duncan's death.

In 1869, 1870, and 1872 Kennedy repeatedly stated orally and in writing to Lyell and other persons that he was acting for the heir or heirs whoever he or they might be, and that he was ready to account to him or them as soon as they were ascertained. In 1880 Kennedy claimed to be in receipt of the rents and profits for himself.

On the 4th of January 1881 the plaintiff brought this action, claiming as assignee by deed in December 1880 of three sisters, E. Bradock (widow) and C. and I. Cunningham (unmarried), who

(1) 18 Q. B. D. 796.

were, he alleged, co-heiresses of Ann Duncan, and in support of this claim he gave evidence of the pedigree of these co-parceners.

In his defence Kennedy relied on the Statute of Limitations, and he also now set up a title of his own to the property as assignee by deed in 1885 of C. R. Lyall who, he alleged, was Ann Duncan's true heir, and gave evidence in support of Lyall's pedigree.

Stephen J. found that the plaintiff had proved the pedigree he had alleged; that the three sisters were the co-heiresses of Ann Duncan; that the Statutes of Limitation were no bar to the action; and gave judgment that the plaintiff recover possession of the land and hereditaments and that an account be taken of all moneys received by the defendant in respect of the land and hereditaments since Ann Duncan's death (1).

It was not disputed by the defendant that if the three sisters were Ann Duncan's heirs, the plaintiff was entitled to recover one-third of the land, since the Statutes of Limitation would be no bar in respect of Mrs. Bradock's one-third, she having been under the disability of coverture till 1877.

The Court of Appeal (Lord Esher M.R., Bowen and Fry L.JJ.) set aside the judgment of Stephen J. and entered judgment for the plaintiff for one-third of the premises with an inquiry as to mesne profits in respect of such one-third; being of opinion that though the three sisters were Ann Duncan's heirs the action was barred by the Statutes of Limitation as to two-thirds (2).

The plaintiff brought the present appeal against so much of this decision as was adverse to himself; and the defendant brought the cross-appeal against so much as was adverse to himself. The questions raised by the cross-appeal are stated hereafter. The appeal was heard first and the only question raised by it was as to the Statutes of Limitation.

May 20, 21, 23, 24. Sir *C. Russell* Q.C. and *Rigby* Q.C. (*A. T. Lawrence* and *Robert Wallace* with them) for the plaintiff, appellant:—

The real question is, in what character did Kennedy receive

(1) 18 Q. B. D. 804. (2) 18 Q. B. D. 796.

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the rents and profits and deal with the land and the receipts after Ann Duncan's death? At the moment of her death her heirs became seised in fee simple of the realty, which was all in the possession of her tenants: Joshua Williams on Seisin ed. 1878, pp. 4, 5; Watkins on Descents 4th ed. pp. 56, 57. At common law the mere payment of rent to a stranger never worked a disseisin: 2 Inst. p. 413; the receipt of rent was no ouster, for no person by wrong could gain another's right: Sugden's Real Property Statutes 2nd ed. ch. 1 s. 4 par. 12; 2 Smith's Lead. Cas. 9th ed. p. 759; *Doe* v. *Danvers* (1); *Bushby* v. *Dixon* (2), where a stranger received the rents as of right, yet it was held that the heir was seised in fact upon the death of the intestate, the possession of the tenant for years being the possession of the heir and giving him a seisin in fact. Nor does it make any difference whether the tenancy be yearly or on lease. There can be no disseisin except at the option of the disseisee: Shelford's Real Prop. Stat. 8th ed. p. 177.

[LORD HALSBURY L.C. referred to *Blunden* v. *Baugh* (3).]

Kennedy did no act of ownership: did not turn out the tenants or make them attorn to him. He went on as before Ann Duncan's death, of whose death or even existence the tenants probably knew nothing. Even if Kennedy entered upon the land the entry would enure to the benefit of the true heirs and would "vest the lands in them without any commandment precedent, or agreement subsequent:" 2 Co. Lit. 258 a. Ratification is therefore unnecessary. Again, a person who has got into possession in a fiduciary character cannot assert a claim on his own account till he has got rid of the fiduciary relation: *Williams* v. *Pott* (4); *In re FitzGerald* (5); *Stone* v. *Godfrey* (6), and many other cases. A man may make himself "bailiff de son tort." "If one become my bailiff of his own wrong, without my appointment, he is accountable to me:" *Gawton* v. *Lord Dacres* (7); Vin. Abr. "Account," C. 7. And that liability he cannot get rid of, independently of ratification. But here Kennedy constituted

(1) 7 East, 299, 320, 321.
(2) 3 B. & C. 298, 304.
(3) Cro. Car. 302.
(4) Law Rep. 12 Eq. 149.
(5) 2 Sch. & Lef. 431.
(6) 5 D. M. & G. 76.
(7) 1 Leon. 219.

himself agent for whoever might be entitled, "and when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command; nor is it any objection that the intended principal was unknown at the time to the person who intended to be the agent:" *Foster* v. *Bates* (1), per Parke B. Here ratification, if any be necessary, was given by the plaintiff bringing the present action. The Court of Appeal said that ratification could not be given after the twelve years had expired, but that assumes the question in dispute, viz., whether the statute runs at all in such a case as this. The statute must be read remembering that the mere receipt of rent is an equivocal act which may be explained by evidence; the character of the possession, if possession be taken, must be looked at: *Davies* v. *Lowndes* (2); *Doe* v. *Groves* (3); *Baron de Bode's Case* (4). To bring the case within 3 & 4 Will. 4 c. 27 the possession must be a possession on the person's own account; the statute leaves untouched the relation of trustee and cestui que trust, guardian and infant, master and servant, principal and agent. Having received the rents in a fiduciary character Kennedy cannot set up the statute as a defence: *Pelly* v. *Bascombe* (5); *Smith* v. *Bennett* (6): and see *Shaw* v. *Keighrón* (7). To bring the case within the statute there must be both absence of possession by the rightful owner and actual possession by another: *Agency Co.* v. *Short* (8); *Smith* v. *Lloyd* (9). And the possession of the wrongdoer must be inconsistent with the possession of the true owner: *Leigh* v. *Jack* (10).

In construing the 3 & 4 Will. 4 c. 27 great difficulty arises from the different uses of the word "rent" even in the same section, as is pointed out in *Doe* v. *Angell* (11). In sect. 2 it does not mean rent reserved on a demise: *Grant* v. *Ellis* (12), approved of in *Irish Land Commission* v. *Grant* (13). The receipt of rents and profits is not made equivalent to possession except in the

(1) 12 M. & W. 226, 233.
(2) 5 Bing. N. C. 161, 172; 6 M. & G. 471, 520.
(3) 10 Q. B. 486.
(4) 8 Q. B. 208.
(5) 4 Giff. 390, 395.
(6) 30 L. T. (N.S.) 100.
(7) Ir. Rep. 3 Eq. 574, 578, 579.
(8) 13 App. Cas. 793.
(9) 9 Ex. 562.
(10) 5 Ex. D. 264.
(11) 9 Q. B. 328, 356.
(12) 9 M. & W. 113, 128.
(13) 10 App. Cas. 14, 26.

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special case of a lease in writing and under the circumstances mentioned in sect. 9, which is not applicable to the present case. No section applies to the case of a person who has received rents as an agent, or as express trustee. There is evidence on which Kennedy may be fixed with a trust; or if not then with agency. His admissions, though not acknowledgments of title in writing within sect. 14, may be used as evidence against him: *Doe* v. *Beckett* (1). And he cannot screen himself from the consequences of his acts merely by saying that he was not at the time authorized to act as he did: *Rackham* v. *Siddall* (2). *Sanders* v. *Sanders* (3) relied on by the Court of Appeal is really an instance in favour of the appellant that ratification of an agency is unnecessary.

Sir *Horace Davey* Q.C. and *Smyly* for the defendant, respondent:—

On Ann Duncan's death her heirs no doubt became seised, but whether Kennedy's acts worked a disseisin is not the question. The old law as to disseisin, discontinuance, and adverse possession is swept away. The question is whether the action was brought within twelve years after the right accrued, and that question turns on the true interpretation to be put upon 3 & 4 Will. 4 c. 27. The defendant's contention resolves itself into four propositions. First, if any person other than the plaintiff is in receipt of profits for twelve years the action is barred. Secondly, no acknowledgment except in the mode required by sect. 14 of the Act saves the bar. Thirdly, there cannot be agency unless by contract. Fourthly, there can be no ratification after the expiration of the statutory period, when by sect. 34 the claim is extinguished. A receipt of the rents and profits by any person other than the plaintiff is enough. If an action of ejectment were brought against a yearly tenant who had paid rent to Kennedy for twelve years, the tenant could plead the statute, not for his own benefit, but for that of Kennedy, and Kennedy would be a person receiving the rents and profits within the Act. The policy of the Act is to throw on the claimant the onus of shewing

(1) 4 Q. B. 601.
(2) 16 Sim. 297, 305; 1 Mac. & G. 607, 621.
(3) 19 Ch. D. 373.

that he was in possession or in receipt of the rents and profits within twelve years; and if he fails in that his title is extinguished by the Act itself: *Dawkins* v. *Lord Penrhyn* (1). The essential distinction between a title by prescription and a defence under the Statute of Limitations is that in prescription a defendant relies on something he or his predecessors have done; under the Statute of Limitations the defendant relies on what the plaintiff has not done. Kennedy's statements as to his receipt of the rents were merely statements of legal fact and consequence. They were not intended to and did not make him trustee or agent for whoever might be entitled or establish any relation between himself and such unknown person or persons. There is no evidence that he represented himself to be collecting the rents for the heirs: but if there were it would merely create an estoppel between himself and the tenants, it would not help any one else. No communication was ever made by Kennedy to the heirs, nor was any relation established between them. It would reduce sect. 14 of the Act to a nullity if Kennedy's statements were held to be admissions of title. In all the authorities relied on by the plaintiff there was some relation with or communication to the person against whom the Statute of Limitations was set up, such as to raise an estoppel. The only exception is *Pelly* v. *Bascombe* (2), where Turner L.J. on appeal (3) manifestly did not agree with the decision of Stuart V.C., and the case cannot be considered as good law. As to agency there cannot be such a thing until acceptance or ratification by the principal, and ratification after the statutory period has run is too late; the title is extinguished. Sect. 8 must be read with sect. 35. As to the land Kennedy was clearly not an express trustee. But it is said he was of the moneys which he received and paid into the bank in the names of Buchan's executors. Buchan's executors however were not Ann Duncan's heirs: between them there was no relation, no privity of estate or title. The moneys he received were his own property, and would have passed on his bankruptcy to his trustee in bankruptcy, though he might have been liable to account for them. The judgment

(1) 4 App. Cas. 51, 59. (2) 4 Giff. 390.
(3) 34 L. J. (Ch.) 233, 235; 13 W. R. 306.

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of the Court of Appeal gives the true construction of sect. 8. [They also discussed the cases cited contra and referred to *Nepean* v. *Doe* (1); *Dixon* v. *Gayfere* (2); *Lord Audley* v. *Pollard* (3); *Bird* v. *Brown* (4).]

[The House took time for consideration, LORD HALSBURY L.C. saying that if their Lordships desired to hear the appellant's counsel in reply notice would be given.]

The cross-appeal was then heard. Each party contended that he had made out his own pedigree, and that the other had not made out his. This involved long arguments on both pedigrees; but the only questions material to this report arising upon the cross-appeal were as follows:—

At the trial before Stephen J. the defendant, in attempting to prove the pedigree under which he claimed, tendered in evidence certified extracts of entries in Scotch parish registers (produced from the General Registry Office, Edinburgh) relating to births and baptisms, proclamations and celebrations of marriages, and burials. The entries were numerous, and of various dates between the latter part of the 17th and the early part of the 19th century. They were all unsigned and no evidence was given as to the handwriting. A solicitor in Edinburgh was called for the defendant, and gave evidence as to the admissibility of these entries by the law of Scotland, and referred to 2 Dickson, Evidence in Scotland, s. 1126. He stated that such entries were made by the session clerks, but what their duties were did not clearly appear. The entries were objected to, and Stephen J. thought them inadmissible, but admitted them subject to objection. The Court of Appeal held the entries inadmissible on the ground that it was not sufficiently proved that there was any public duty imposed on a minister or a session clerk to make the entries, nor that the entries were in the handwriting of any person deceased whose duty it was in the ordinary course of his business to make such entries.

The defendant also tendered in evidence certain proceedings in the Sheriff's Court of Perthshire. Stephen J. held these also

(1) 2 M. & W. 894.
(2) 17 Beav. 421.
(3) Cro. Eliz. 561.
(4) 4 Ex. 786.

to be inadmissible, but admitted them subject to objection. The Court of Appeal gave no opinion on this point, it being in their view unnecessary to do so. The nature of the proceedings, their effect upon the evidence and the question as to their admissibility are described in the judgment of the Earl of Selborne.

May 24, 27, 28, 31; June 4. Sir *Horace Davey* Q.C. and *Smyly* for the defendant, appellant in the cross-appeal:—

First as to the parish registers. These are admissible in Scotland by Scotch law, and are therefore evidence in English Courts. The Act 23 & 24 Vict. c. 85 (amending 17 & 18 Vict. c. 80) by sect. 6 directed all existing parochial registers to be transmitted to the Registrar-General for preservation in Edinburgh. It treats them as public documents. In 1616 the general assembly of the Church of Scotland passed an Act regulating parish registers. And by an order or enactment of the Scottish Privy Council (10 Dec. 1616) the entries were to be signed by the minister and other persons and the registers were ordained to be held "as famous and authentic;" see 2 Dickson, Evidence in Scotland, s. 1126; and the Booke of the Universal Kirke of Scotland, part iii., 1593–1618. That all the formalities enjoined as to these registers were not observed makes them of less weight, but not inadmissible. They are treated as official records in Bell's Principles of the Law of Scotland, s. 2212 A., and are admissible as public documents within the principles laid down in *Sturla* v. *Freccia* (1). Their effect is one thing, their admissibility another. That they were admitted from early times without question appears from *Wilson* v. *Aitken* and *Thomson* v. *Stevenson* recorded in Morison's Dictionary of Decisions, pp. 12700, 12701: and *Watson* v. *Glass* (2). See also *Hutton* v. *Harper* (3), as to proclamations of banns. Assuming that these entries were made by session clerks, and not by the ministers, they are admissible: the session clerk being a public officer whose duty it was to keep the registers: per Lord Deas in *Goldie* v. *Christie* (4). It is not like the case of *Davis* v. *Lloyd* (5), where

(1) 5 App. Cas. 623, 633, 642.

(2) 15 Court Sess. Cas. 1st Series (1837), 753.

(3) 2 Court Sess. Cas. 4th Series, 893, 901; 3 Ibid. 9.

(4) 6 Court Sess. Cas. 3rd Series, 541, 544, 546.

(5) 1 Car. & Kir. 275.

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an entry of circumcision by the chief rabbi was rejected, the chief rabbi not being a public officer.

The matter is really concluded by the authority of this House. In July 1839 extracts from parish registers in the 17th century of proclamations of marriages, baptisms, and burials, though unsigned and without evidence as to the handwriting, were admitted without objection in *The Airth Peerage Case* (1). Similarly on the 31st of May 1827 examined extracts from Kirk session-books of Inverness parish of 1612 and 1613, though unsigned and without evidence as to the handwriting, were admitted without objection in *The Lovat Peerage Case* (2). In this House it is not necessary (as it was before Stephen J. and in the Court of Appeal) to rely on the evidence of those learned in Scotch law: noble and learned Lords being themselves acquainted with that law.

Secondly, as to the proceedings in the Sheriff's Court. These are admissible to prove the subject-matter of the action and the character in which the defendant was sued; viz. that a person described as Elspeth Duncan accepted a bill for a debt alleged to be due for rent of premises in Glencarse; that James Martin was after her death sued as her representative for that debt, and was (as he admitted in his defence) her son; and that judgment was recovered against him.

Sir *C. Russell* Q.C. and *Rigby* Q.C. (*A. T. Lawrence* and *Robert Wallace*) with them for the plaintiff, respondent in the cross-appeal:—

First, as to the parish registers. The Act of Assembly of 1616 relied on by the other side was rescinded by an Act of 1638 which rescinded all the Acts of 1616. And the Act of Parliament of 1645 cited in 2 Dickson, Ev. Sc. s. 1126 was rescinded by an Act of the Parliament of Scotland (c. 126) on March 28, 1661, rescinding all the Acts of 1645 and several other years. There is no evidence that these registers were kept or the entries in them made by the ministers whose duty it was to make them. Mr. Ritchie's evidence goes to shew that the session clerks made

(1) Printed Minutes of Evidence, pp. 68–70.

(2) Printed Minutes of Evidence, pp. 72, 73.

such entries, but there is no proof that the session clerks were ever present at baptisms or marriages. Till 1816 it was not the duty of the session clerks to make the entries. But even admitting that these registers are receivable in Scotch Courts and in Scotch Peerage Cases, they are not so in English Courts. The law of Scotland is much looser and wider as to hearsay evidence than the law of England. The question of a public duty to keep the registers was never discussed in Scotch law: see *Hay* v. *Murdoch* (1). And the registers of dissenting sects are as admissible as those of the established Church. Scotch Courts will even look at private deeds between third parties where no better evidence can be got. In England official registers are not admissible unless it is proved that the entries were made by the persons whose public duty it was to make them: *Doe* v. *Bray* (2); Taylor on Evidence, 8th ed. ss. 1591–1595, and 1774. The Fleet registers of marriage were never evidence for any purpose: *Davies* v. *Gatacre* (3); Taylor Ev. 8th ed. s. 1592; not even under 3 & 4 Vict. c. 92, which made other registers receivable, see sect. 20. It is not enough to prove that a foreign register is evidence in a foreign country; it must be shewn that it is evidence here: *Abbott* v. *Abbott* (4); and see *Coode* v. *Coode* (5). A register of baptism is no evidence in English law as to the parentage: *Thrussell* v. *Barker* (6); nor as to the date of birth: *R.* v. *Clapham* (7); *Wihen* v. *Law* (8); and see *Chambers* v. *Bernasconi* (9).

Secondly, as to the proceedings in the Sheriff's Court. They are not receivable, being res inter alios actæ. Moreover there were no sworn statements; and no admission signed by James Martin. Pleadings are not admissible as declarations or admissions of facts contained in them. The only exception is in the case of a sworn answer to a bill or where it is agreed by the parties to be taken without oath or signature. A bill in equity and depositions taken in the cause were rejected as not being evidence of the facts therein deposed to or as declarations respecting

(1) 16 Court Sess. Cas. 2nd Series (1854), 364.
(2) 8 B. & C. 813.
(3) 8 Car. & P. 578.
(4) 4 Sw. & Tr. 254, 255.
(5) 1 Curt. Eccl. R. 755, 767.
(6) 17 L. T. (N.S.) 665.
(7) 4 Car. & P. 29.
(8) 3 Stark. 63.
(9) 1 Cr. & Jer. 451.

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pedigree, in *The Banbury Peerage Case* (1), in accordance with the opinions of the Judges; and see *Gee* v. *Ward* (2); *Boileau* v. *Rutlin* (3). A bill in Chancery is not evidence as to the statements contained in it, even against the party making it: Taylor Ev. 8th ed. p. 574. Again, before a declaration as to a matter of pedigree can be received, the relationship of the declarant with the family must be established by some proof independent of the declaration itself: per Lord Chelmsford in *Attorney-General* v. *Köhler* (4). And here there is none.

Sir *H. Davey* Q.C. in reply:—

As to the parish registers no particular mode of keeping them was required by the law of the Scotch Church: signature to the entries is not necessary: see Steuart of Pardovan's Government of the Church of Scotland, ed. 1773, tit. Kirk Sessions, bk. 1, part 1, tit. 11, p. 43, s. 7, and tit. 13, p. 48; bk. 2, tit. 3, p. 95, s. 13; bk. 2, tit. 5, p. 114, s. 19. As to these registers being admissible as public documents see *Lovat Peerage Case* (5), where a bill of mortality kept apparently under an order of the Presbytery of Inverness was admitted.

The House took time for consideration.

Aug. 1. EARL OF SELBORNE:—

My Lords, the question first in order in this case is that of title, raised by the cross-appeal. I shall throughout speak of Dr. Lyell as appellant, and of Mr. Kennedy as respondent, though in the cross-appeal those positions are reversed.

I do not think that all the evidence which the Courts below thought inadmissible (though in the Court of first instance it was received de bene esse, and its effect was considered) ought to be rejected. Foreign registers of baptisms and marriages, or certified extracts from them, are receivable in evidence in the Courts of this country, as to those matters which are properly and

(1) 2 Selw. N. P. 10 Ed. p. 756; and Le Marchant's *Gardner Peerage Claim*, App. p. 410.
(2) 7 E. & B. at p. 517.
(3) 2 Ex. 665, 678.
(4) 9 H. L. C. at p. 685.
(5) 10 App. Cas. 787, 788.

regularly recorded in them, when it sufficiently appears (in the words of Mr. Hubback's learned work on Evidence) that they "have been kept under the sanction of public authority, and are recognised by the tribunals of the country" (i.e. of the country where they are kept) "as authentic records."

I am of opinion that this does sufficiently appear, as to the Scottish parochial registers, speaking generally, from Mr. Dickson's work, from Mr. Bell's Principles, and from the admission of registers, exactly like those now in question, by this House in the *Airth Peerage* and other cases (see Hubback, pp. 519, 526). Certified extracts from Scottish parochial registers have been produced in this case from the General Register Office in Scotland, where they are now kept under the statutes 17 & 18 Vict. c. 80, 18 Vict. c. 29, and 23 & 24 Vict. c. 85. Those statutes do not make anything evidence, either here or in Scotland, which without them would not have been so. But, if your Lordships may act upon that judicial knowledge of Scottish law which you possess, as the Court of ultimate appeal from all parts of the United Kingdom (and within my experience you have so acted upon your knowledge of English law, when questions of English law have arisen in Scotch appeals), it is certain that these registers would be receivable in Scotland, subject to just exceptions as to particular entries in them, as parochial registers kept under the sanction of public authority, for whatever they may be worth; anything imperfect or unsatisfactory, in the way in which they were generally kept, affecting only their weight in re dubia, and not their admissibility.

Nor do I think it less certain that they were kept in Scotland under public authority from a time not later than the first half of the seventeenth century, because there is some obscurity about the origin of the legal obligation to keep them. Entries of matters not properly finding place in the particular registers (as for instance the entry of a baptism in the parish of St. Madoes in the register of births and baptisms for the parish of Kinfauns, which is among the extracts tendered in the present case) may be properly rejected, although entries appearing to have been regularly made in the proper registers may be received. The interests of justice would not be promoted, if such evidence as

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this, receivable in Scotland, could not be received in England, in a question of Scotch pedigree, relating to persons and families always resident and domiciled in Scotland. If the law were so, it must prevail; but I am glad to be able to come to the conclusion that it is not so. For the decision of that question the Courts below had not equal advantages with your Lordships; though, for my own part, I think it might have been possible to come to the same conclusion on Mr. Ritchie's evidence, referring as he did to Mr. Dickson's book as of authority in Scotland.

With respect to the proceedings in 1766, in the Sheriff's Court of Perthshire (which were produced from the proper custody), I consider them also admissible, on the same principle on which answers and decrees in Chancery have been admitted by this House in Peerage cases, as to matters of pedigree, "when the facts of the pedigree were not in dispute, but only incidentally stated." (Phillips on Evidence, vol. i., 8th ed., p. 232; Hubback, p. 682.) This has been done since, as much as before, the opinion of the judges in the *Banbury Peerage Case* (1), with which, and with the judgment in *Boileau* v. *Rutlin* (2) it does not seem to me inconsistent. The question in those cases was as to statements in bills; and the latter case was not one of pedigree. In the *Shrewsbury Peerage Case* (3) this House received an Irish answer as to matter of pedigree, though the answer was without oath or signature; Lord Wensleydale (the same judge who decided *Boileau* v. *Rutlin* (2)) saying: "It" (the answer) "must be received as the statement of the party making it; and being found on the files of the Court, it must be presumed that it got there by proper authority." To make an answer evidence, the bill to which it was an answer must always be put in; but the bill itself is not evidence, unless made so by the answer.

In the present case, I regard the notarial protest of 1754, and the proceedings in the Sheriff's Court in 1766, as admissible for the purpose (and only for the purpose) of shewing that at that time, when there was no question of pedigree in dispute, one James Martin, described as "in Cottarstown of Pitfour," was

(1) 2 Selw. N. P. 10th ed. p. 756. (2) 2 Ex. 665.
(3) 7 H. L. C. 32.

sued by the Duke of Athol (claiming by assignment from Lady George Murray of Glencarse), as representative, by right or by wrong, of one Elspeth Duncan, described as "late in Glencarse, and afterwards indwelling in Perth," upon a bill of exchange accepted by that Elspeth Duncan in 1754 for arrears of rent in Glencarse, due by her to Lady George Murray; and that James Martin (not disputing any of those matters), by his defence in the last stage of those proceedings spoke of that Elspeth Duncan as his mother, and that a decree passed against him for the amount claimed, on proof of service of summons upon him in Cottarstown; the validity of which service he did not in the subsequent proceedings call in question.

It was urged, that to make the statement of that James Martin (that Elspeth Duncan was his mother) evidence in favour of the pedigree set up by the respondent, it was necessary, by evidence aliunde, to connect him or his mother with the family of George Duncan of Waltree; and to this I agree. But all that was necessary, in my opinion, was to give such primâ facie evidence of that connection as might be sufficient, if not met by evidence on the other side. This, I think, the respondent did, by proof aliunde of the marriage of Elspeth, daughter of George Duncan of Waltree, to John Martin of the Mill of Glencarse, on the 1st of November 1728, and of the baptism of James, son of John Martin of Glencarse, on the 24th of August 1729, little more than nine months after that marriage. If the matter had stood upon the respondent's evidence only, I should probably have thought the agreement of names and descriptions in the protest and proceedings of 1766 enough to shew the identity of the Elspeth of those proceedings with the daughter of George Duncan of Waltree, and of the James Martin of those proceedings with the person of that name baptized in 1729.

That, however, is not the state of the evidence before your Lordships; and I proceed (treating the respondent's evidence, with some exceptions not necessary to be particularly mentioned, as admissible) to consider its value and effect, in conjunction with that on the other side.

The appellant proved that there were in and near Perth many Duncans and Martins, and not unfrequently the names Elspeth

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Duncan and James Martin; many Dowies also, of whom a John and George "fleshers in Perth," were son-in-law and grandson of George Duncan of Waltree; and another John and George Dowie (also fleshers in Perth, and father and son, the son baptized in 1723) might also have been living in 1766. The parishes of Kinfauns and St. Madoes, in that neighbourhood, adjoin each other; Glencarse is in Kinfauns; Pitfour, with its hamlet of Cottoun, or Cottarstown, is in St. Madoes. An Elspeth Duncan, "daughter of Patrick Duncan of Cottoun in Pitfour," was baptized in St. Madoes parish on the 20th of July, 1703. There is nothing to shew that she intermarried, or lived as if married, with a person named Martin, or had a son called James Martin; if, however, she had such a son, it would be consistent with the whole evidence, that he might have been the defender in the Duke of Athol's suit. In Scotland, marriage may be irregular, as well as regular; if irregular, it would not be likely to be registered, and the parochial registers, both of marriages and of baptisms, were too loosely kept to give weight to any presumption from their silence. It does not appear that John Martin, the miller of Glencarse, ever held land under Lady George Murray; or that Elspeth Duncan, named in the notarial protest of 1754, lived at the mill of Glencarse. As to the Dowies, the only relation between them and Elspeth Duncan, mentioned in the proceedings of 1766, was that of debtor and creditor. The residence in Cottoun, in 1766, of a son of Elspeth who was a native of Cottoun, might perhaps be more probable, than that of the son of the miller of Glencarse; at all events it would be as likely that an Elspeth Duncan, born in Cottoun, might have lived for a time and held land in Glencarse, as that the son of the miller of Glencarse should, when thirty-seven years old, be found living in Cottoun. I do not think there is any force in the appellant's argument from Elspeth Duncan, the miller's wife, not being named in her mother's will, dated the 17th of August 1747.

I have endeavoured to give due weight to all these considerations, which shew that it is possible that James Martin, the defender to the Duke of Athol's suit, may not have been the grandson of George Duncan of Waltree; and after having done

so, I still think it probable that, if it were necessary to decide that point, my opinion upon it would not be against the respondent. But this would do the respondent no good, unless he could also identify with that James Martin the person of the same name who married Mary Ducat in 1771, or could otherwise connect the husband of Mary Ducat with the family of George Duncan of Waltree. He has not attempted any other mode of connection; and for the identification of Mary Ducat's husband with the defender to the Duke of Athol's suit, he relies only on the St. Madoes' baptismal register of 1772, describing James Martin and Mary Ducat, the parents of Christian Martin, then baptised, as "in Cottoun." From this the inference is sought to be drawn that James Martin, the father of Christian, was the party to the proceedings of 1766; which, if proved, would be subject to the question already discussed, as to the family to which the James Martin of those proceedings really belonged. But the identity of the James Martin who married Mary Ducat with that person cannot be shewn, by the mere fact that the one in 1766, and the other in 1772, were described as "in Cottarstoun" or "in Cottoun." It is proved that there were at least two other persons named James Martin baptized in the parish of St. Madoes, in which Cottoun is situate, in 1733 and 1746 respectively, either of whom, for anything that appears, may have been living in Cottoun in 1772, and may have married Mary Ducat in 1771.

If the case rested there, the cross-appeal would, in my opinion, fail; but, besides this, there are weighty grounds for the conclusion that the persons, whom the respondent has so failed to connect by satisfactory evidence with the family of George Duncan of Waltree, were really not related to that family. There was neither knowledge nor reputation of such relationship, in the line represented by those persons; nor was there on the part of Ann Duncan. Ann Duncan was living in Perth down to 1836; and Christian, the daughter of that James Martin who married Mary Ducat, and her descendants, also lived there or in the immediate neighbourhood. The relationship, if there had been any, was not so distant as to be likely to be forgotten; and, if Ann Duncan was in better circumstances than her supposed

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relations, it was all the more likely to be remembered and talked about, at least on their part. She was nearly of the same age with John Moncur, son of Christian Martin baptized in 1772, who lived in Perth at the same time with herself, in the respectable position of rector of the academy there, and died in circumstances which attracted public notice. In the course of the numerous suits relating to the succession of Ann Duncan, advertisements for the discovery of her relatives were repeatedly published in the local and other papers; and the searches and inquiries for them (particularly those of the respondent and his agents) were so exhaustive and unremitting as to make it clear, with more than usual certainty, that everything which was possible has been discovered concerning her family. Under those circumstances I agree with the conclusion of the Courts below, that the respondent's case in the cross-appeal fails, and that the title of the coparceners in the Cunningham line under whom the appellant claims, has been sufficiently made out—a conclusion at which it is, to me at all events, much more satisfactory to arrive, after admitting and considering the weight of the respondent's evidence generally, than it would have been if I had found myself obliged to exclude it.

Then there arises the question raised by the first appeal, of the Statute of Limitations, as to which Mr. Justice Stephen's judgment in favour of the appellant has been reversed, as to two-thirds of the property claimed, by the Court of Appeal. The action was brought on the 4th of January, 1881, and, if the appellant is entitled to say that, down to a time less than twelve years before that date, the rents of the property at Manchester were received by the respondent as agent, bailiff, receiver, or trustee for the heirs-at-law of Ann Duncan, it appears to me to follow that the statute (3 & 4 Will. 4, c. 27) is no bar, either as to the land, which has been ever since Ann Duncan's death in the possession of tenants from year to year, or of weekly tenants, whose rent has been regularly paid, or as to the rents and profits which the respondent received.

Ann Duncan was entitled at law in fee simple, for her own absolute use and benefit, to the property in question, under the will of a testator named Lawrence Buchan, who died in July,

1859. She and the respondent were executors of that will; but, as such executors, they had neither interest in, nor duty with respect to, the English real estate. Ann Duncan, however, lived in Fifeshire, and the respondent lived at or near Manchester; and by arrangement between them, for her convenience, the respondent managed that property in the name of "the executors of Lawrence Buchan," under which designation he received and gave acknowledgments for the rents paid by the tenants, and paid them into an account, so entitled, kept by him with bankers at Manchester, separate and apart from his own private and personal account. That designation and that form of account (though the land was vested in Ann Duncan alone, and not in Lawrence Buchan's executors), was indicative of some sort of trust; it was certainly not indicative of a personal right, claim, or interest, on the part of the respondent.

After the death of Ann Duncan on the 5th of November 1867, no break or change was made in that course of management. Ann Duncan left a will, in Scotch form, as to her personal estate only; of that will a gentleman named John Todd was executor. It was part of his duty to ascertain the persons entitled to her undisposed of personalty, who would be sought for, according to Scotch law, preferably in the paternal line; and, though Mr. Todd, as executor, had no duty to perform as to the English real estate, it appears from what is stated in the letter of Messrs. Drummond & Nicholson (Mr. Todd's solicitors at Edinburgh) of the 2nd of December 1867, to the respondent, and not denied or disputed in the reply of the respondent's cashier, Mr. Davies, dated the 11th of December following, that he took sufficient interest in the care and management of the English real estate to communicate on that subject with the respondent; and that the respondent "promised him to look after the English estates." The course of management which had been established in Ann Duncan's lifetime enabled the respondent to go on receiving the rents as before, and he did so. The tenants paid him on the same footing as before; it does not appear that they were aware of Ann Duncan's death; the probable inference from the facts in evidence appears to me to be that they were not. Receipts continued to be given by the respondent, as for "the

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executors of Lawrence Buchan;" and the rents continued to be paid by him to the separate account with the bankers, entitled as the account of those executors.

For whom, and on whose behalf, were those rents received after Ann Duncan's death? Not by the respondent for himself, or on his own behalf, any more than during her lifetime. He knew, and down to 1880 frequently acknowledged, that they belonged to her heirs. He was, indeed, disappointed that she had not made a will in his favour; but to me it is clear that he knew there was no such will. Taking upon himself so to receive the rents of property which to his knowledge belonged to others, though to persons unascertained, and whom it might take time to ascertain—a circumstance which disabled them from looking after their own interests—I should have said, if there had been no authority, that he was chargeable in a fiduciary character with the rents which he received; just as I should have said the same thing of any solicitor or other agent receiving rents under a power of attorney, and continuing to receive them after the death of his client or principal; the tenants being ignorant of the revocation, and taking receipts as before from the attorney. These are questions of fact and of equity, unaffected by anything to be found in any Statute of Limitations.

The respondent's acts, in so receiving the rents, could not, in my opinion, dispossess the heirs of Ann Duncan, so as to put them to their action, either under the 2nd and 3rd, or under the 8th section of the statute 3 & 4 Will. 4, c. 27. If he received on behalf of the heirs, and if they could and did adopt and ratify his agency, they were in, and never out of, possession. I find nothing in the statute to displace or disturb, under such circumstances, the actual possession by their tenants, which (apart from the effect of the statute in the cases to which it applies) the law would ascribe to them, according to *Bushby* v. *Dixon* (1), and other authorities. The respondent had no title to the land; he was never in actual possession of it; and, until he claimed to change his position, and to be in receipt of the rents and profits as for himself (which he never did till 1880), I do not see how there could be a right of action against him for

(1) 3 B. & C. 298, 304.

recovery of that land. How the matter stood as to the rents which he received I shall presently consider.

Lord Coke's doctrine as to the effect of entry by an unauthorized stranger on behalf of the true owner, seems to me applicable, in reason and principle, to such a receipt of rents as that of the respondent in this case down to 1880: "If an infant, or any man of full age, have a right of entry into any lands, any stranger, in the name and to the use of the infant or man of full age, may enter into the lands; and this regularly shall vest the lands in them, without any commandment precedent, or agreement subsequent." (1) The law, in this case, vested not only the lands, but the actual possession of them, in the heirs, unless something was done to displace or interrupt that possession; and that which, in the case of entry, would have the effect ascribed by Lord Coke to the act of a stranger in the name and to the use of the true owner, could not (as it seems to me), in the case of receipt of rents, put the true owner to his action under the statute; but, must on the contrary, operate to confirm and strengthen his legal possession. If there was no interruption of the legal possession of the land by the true owner for more than twelve years before action brought no acknowledgment under the 14th section of the statute was necessary.

As to the rents and profits received by the respondent, and the accumulated fund which arose from them in the banker's hands, there was a series of declarations, oral and in writing, by the respondent, sufficient, in my judgment, to establish against him, by his own admission, a fiduciary character. A man who receives the money of another on his behalf, and places it specifically to an account with a banker ear-marked and separate from his own moneys, though under his control, is in my opinion a trustee of the fund standing to the credit of that account. For the constitution of such a trust no express words are necessary; anything which may satisfy a Court of Equity that the money was received in a fiduciary character is enough. It is not requisite that any acknowledgment of such a trust should be made to the cestui que trust or his agent; to whomsoever made it is evidence against the trustee.

(1) 2 Co. Lit. 258 a.

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Of the respondent's declarations in the present case I will mention some. On the 15th of January 1869 in reply to a letter from the appellant, who then claimed to be Ann Duncan's heir (which in fact he was not), the respondent wrote, "I am in receipt of your letter, and can assure you that if you are Miss Duncan's heir you will have no difficulty with me. Messrs. Drummond and Nicholson have all the particulars of Miss Duncan's estate, and the rents are all placed in bank as they accrue, and regular accounts kept." Again on the 18th of the same month: "As an old friend of Miss Duncan's and Mr. Buchan's, I should advise those concerned to avoid litigation as much as possible. The property will be given up to the rightful owners as soon as it can be satisfactorily ascertained who they are." In the same month the respondent saw Colonel Tulloch, who deposes: "When I spoke with him about Mr. Lyell's claim to the property Mr. Kennedy said: 'Don't let him make any fuss or claim on the tenants, or the whole thing will go to ruin. I am taking care of the place for the heir, whoever he may be.' He showed me a large book of account and several other books which he said were all in order for examination when the heir, whoever he might be, turned up. He said, 'Leave everything in my hands;' and 'I will take care of everything till the right heir turns up; everything is safe in my hands.'" In February 1870 the defendant wrote to Messrs. Drummond and Nicholson: "When the claimants to Miss Duncan's estate are ascertained, the property will be found in good repair, the money ready, and the accounts in order." In 1872 (within twelve years of the commencement of this action) he made claims against Ann Duncan's personal estate in the Scotch administration suit, on the footing of his being manager of this property after her death, and those claims were partly allowed. On the 16th of April in that year he wrote to Mr. Buchan of Toronto (a relative of Ann Duncan, and a possible heir): "I am acting for the heir-at-law whoever he may be . . . I claim, on the part of the heir-at-law, that the repairs on the mill property should be charged on the personal property."

It was suggested in argument for the respondent that all this might be explained by his legal liability for rents received by him until the statute had run. But (not to insist on his

letter of the 29th of October 1879, in which he assented to the proposition that he was not capable of setting up the Statute of Limitations against the parties entitled to the property) the declaration to Colonel Tulloch, and the letter of the 16th of April 1872 (with which all his other letters and acts down to 1880 were consistent), appear to me repel that explanation.

In order to test the effect in equity of these acts and declarations of the respondent, I will suppose the case of his having become bankrupt at any time before 1880. Would the accumulated fund which had arisen from the rents received after Ann Duncan's death, and which was standing to the account of "the executors of Lawrence Buchan," or any part of it, have passed to the respondent's trustee in bankruptcy, as against a claim by Ann Duncan's heirs-at-law? The account was ear-marked; none of the moneys credited to it were, or had ever been, the property of the respondent; it did not stand in his name; it was under a title, both primâ facie, and when explained by tracing it to its origin, significant of trust. I am of opinion that such an account, even if it had stood in his name, would be within the principle of *Pennell* v. *Deffell* (1); and that no part of it, neither that part received more than six years before the bankruptcy, nor what was received since, would have passed in the case supposed to the respondent's trustee in bankruptcy.

No authority was cited for the respondent to shew that he was not chargeable in a fiduciary character under these circumstances, or that as long as he acted as agent and receiver for the heirs (though unascertained) any Statute of Limitations would run against them in his favour. In the absence of authority, I should have been content to decide such a case on principle; but for the principle which I consider applicable to it, *Rackham* v. *Siddall* (2), and its sequel, *Life Association of Scotland* v. *Siddall* (3), seem to me to be authorities, as high as any can be, short of a decision of this House. The principle of those decisions, as stated by Turner L.J. in the latter case, was, that a person who had assumed to be a trustee "could not be heard to say, for his own benefit, that he had no right to act as a

(1) 4 D. M. & G. 381-386. (2) 1 Mac. & G 621.
(3) 3 D. F. & J. 69.

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trustee." Mr. Lewin, in his learned and accurate treatise upon the Law of Trusts, thus puts it (7th ed. p. 191): "If a person, by mistake or otherwise, assume the character of trustee when it really does not belong to him, and so becomes a trustee de son tort, he may be called to account by the cestui que trust for the monies he received under colour of the trust."

Other authorities were cited by the appellants' counsel at your Lordships' bar, which, though not decisions, have the weight due to opinions of eminent judges, reasonable in themselves and with nothing against them. In *Gawton* v. *Lord Dacres* (1) Anderson J. said: "If one become my bailiff of his own wrong, without my appointment, he is accountable to me." In *Shaw* v. *Keighron* (2) Walsh, Master of the Rolls of Ireland (that case being under the 9th section of the Statute of Limitations), said: "I think it is necessary to go beyond the mere circumstance, that some one not entitled to the rent has received and kept it. The section requires not only that the rent should have been received by a person other than the person rightfully entitled, but that it should have been received under some claim of title, and that a wrongful one. For example: if rent were received by a person falsely pretending to be agent to the rightful owner, and who never accounted for it, this would not bar the rightful owner. The mere fact that the rent was received and kept by a person other than the right owner, no doubt raises a presumption that it was received under a wrongful claim of title; but that is only a presumption, and may be negatived by the circumstances." Under the 9th section, a lessee for years, paying rent to a person, "wrongfully claiming to be entitled," is supposed to be in possession, and a title can only be acquired against the true owner by a wrongful receipt of rents. The same words are not elsewhere used; but I am of opinion that what was said by the learned judge is equally true of any other case in which the statute is set up as a bar to the true owner by virtue only of the receipt of rent from tenants in possession. I think that such receipt of rent, in order to exclude the true owner, must always be by a person wrongfully claiming, and not receiving, or claiming to receive, on behalf of the true owner. When the true owner can

(1) 1 Leon. 219. (2) Ir. Rep. 3 Eq. 574.

and does ratify an agency undertaken on his behalf, though without his antecedent authority, the case is the same as if he had himself received the rents.

It is unnecessary to consider how the matter would stand, towards either the self-constituted agent or the tenants who paid rent to him, if the agency were (as it might be) repudiated. The true owner must either approbate or reprobate; he cannot do both. That (as was said of the option of the cestui que trust to take to or reject an improper mode of dealing with trust moneys by a trustee, in *Pennell* v. *Deffell* (1)), is a different matter, with which your Lordships have not now to deal. Here the agency has been ratified, if when the action was brought it was capable of ratification, as in my opinion it was.

The Court of Appeal seems to have considered that in a case in which the assumed agency for the management and receipt of the rents and profits of land was unauthorized by the true owner, it must be adopted and ratified within twelve years from its commencement; and that, otherwise, the true owner would be barred under the 8th section of the statute, as if no rent at all had been received during those years from the tenants (in this case tenants from year to year or weekly tenants) in respect of their tenancies. These propositions appear to me to assume the main question, as to the statute running during the continuance of the self-constituted agency between the true owner and the person taking upon himself to act as agent. I find nothing to support them in the Statute of Limitations itself; and I do not think them well founded in principle. It is enough, in my judgment, if the agency is ratified within such a time as is reasonable under the circumstances between the true owner and the assumed agent. In this case the ratification took place as soon as was reasonably possible after the co-heiresses had been ascertained, and hardly more than a year after the last of an uninterrupted series of acts by the respondent upon the footing of agency. That, in my opinion, was enough. The present question is not with the tenants; they have regularly paid rent in respect of their tenancies, and they cannot have any claim, under the 8th or any other section of the statute, against the reversioner, if he is

(1) 4 D. M. & G. 383.

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entitled to take, and does take, the benefit of their payments. Whether he is or is not entitled, as against the respondent, to an account of those rents, and to receive future rents, is a question with which the tenants (so long as they are protected against a double claim) have no concern. There is not here a jus tertii, complete before ratification, as there was in *Lord Audley* v. *Pollard* (1), and *Bird* v. *Brown* (2). Those cases are good law, but I think them inapplicable to a question between the self-constituted agent and the ratifying principal.

I am not sure that the form of Stephen J.'s order, so far as relates to the recovery of the possession of the land, may not require amendment so as to shew that the possession to be recovered by the appellant is subject to the existing tenancies; and I think that in taking the account directed, all just allowances must be made to the respondent. That would be the rule in equity (which since the Judicature Acts must prevail), however the case might have stood in the old action of account at law. Subject to such formal variation I think that the order of Stephen J. was right, and ought to be in substance restored; and that the respondent ought to pay all the costs of this litigation, which, in my opinion, nothing but the controversy as to the true heirship to Ann Duncan could at all excuse.

I therefore move your Lordships to declare that the recovery of possession adjudged to the plaintiff Lyell is to be subject to the existing tenancies, and that in taking the account directed all just allowances are to be made to the defendant Kennedy; and with that declaration to reverse the order of the Court of Appeal and restore the order of Stephen J., and dismiss the appeal of the defendant Kennedy with costs; the defendant Kennedy to pay all costs here and in the Courts below.

LORD FITZGERALD :—

My Lords, I have read with care and studied the judgment which has just been delivered, expressed in such carefully considered and measured language by the noble and learned Earl, and I entirely concur with that judgment and with its conclu-

(1) Cro. Eliz. 561. (2) 4 Ex. 786.

sions. I have nothing to add save this, that the judgment expresses the conclusions at which I, speaking for myself personally, had arrived at the close of the full and lengthened hearing of this cause at your Lordships' Bar, after listening to and having had a full opportunity of considering in the course of the case the very learned argument addressed to us, an argument so learned, so full, and so elaborate as to leave nothing to be desired.

LORD MACNAGHTEN:—

My Lords, I too have had the advantage of reading and considering the opinion of the noble and learned Earl on the appeal and cross appeal. I desire to say that I entirely concur in that opinion.

I would only venture to add with regard to the appeal that it seems to me that the principle which governs the case may be stated concisely in the words of the late Lord Justice Giffard. In *Burdick* v. *Garrick* (1) that learned judge expressed himself as follows: "I do not hesitate to say that where the duty of persons is to receive property and to hold it for another and to keep it until it is called for they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it."

My Lords, I think that is a sound proposition. I do not think it can make any difference what the nature of the property may be, whether it is a lump sum, or collected in the shape of rents accruing from time to time. I do not think it can make any difference whether the person on whose behalf the property is professedly received is or is not under disability or unborn or unascertained. Nor do I think it can make any difference whether the duty arises from contract or is connected with some previous request, or whether it is self-imposed and undertaken without any authority whatever. If it be established that the duty has in fact been undertaken and that property has been received by a person assuming to act in a fiduciary character, the same consequences must, I think, in every case follow.

(1) Law Rep. 5 Ch. 243.

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LORD HALSBURY L.C.:—

My Lords, I have had an opportunity of reading the judgment of the noble and learned Earl, and only desire to say that I entirely concur both with the conclusions he has arrived at and with the reasons by which he has arrived at them.

Order of the Court of Appeal reversed, and order of Stephen J. restored subject to the following declaration:—That the recovery of possession adjudged to the plaintiff shall be subject to the existing tenancies, and that in taking the account directed all just allowances shall be made to the defendant. The cross-appeal of the defendant dismissed with costs; the defendant to pay all costs here and in the Courts below, including the costs of the shorthand writers' notes of the evidence at the trial: Cause remitted to the Queen's Bench Division.

Lords' Journals 1*st August* 1889.

Solicitor for Lyell: *J. Balfour Allan.*

Solicitors for Kennedy: *Rooke & Sons for Earle, Sons & Co., Manchester.*

[HOUSE OF LORDS.]

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Aug. 8.

THE GUARDIANS OF THE REIGATE UNION . . . . . } APPELLANTS;

AND

THE GUARDIANS OF THE CROYDON UNION . . . . . } RESPONDENTS.

THE GUARDIANS OF THE HIGHWORTH AND SWINDON UNION . . . . . } APPELLANTS;

AND

THE GUARDIANS OF THE WESTBURY-ON-SEVERN UNION . . . . . } RESPONDENTS.

THE GUARDIANS OF THE MEDWAY UNION . . . . . } APPELLANTS;

AND

THE GUARDIANS OF THE BEDMINSTER UNION . . . . . } RESPONDENTS.

Poor Law—Settlement—Derivative Settlement—Retention of Settlement after Sixteen—Child under Sixteen—Irremovability—Emancipation—Widowed Mother—Residence as Wife and Widow—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

After the Divided Parishes Act 1876 came into operation a pauper's father acquired a settlement in Penge, and his wife and child thereupon took his settlement and never acquired any subsequent settlement in their own right. The pauper's mother was born in Reigate, which was her maiden settlement. After the father's death an order was made adjudging the last legal settlement of the pauper, then under the age of sixteen, to be in Penge:—

Held, reversing the decisions of the Queen's Bench Division and the Court of Appeal (19 Q. B. D. 385), that under sect. 35 of the Divided Parishes Act 1876 the widow did not upon her husband's death revert to her maiden settlement; and that the pauper upon her father's death did not take the maiden settlement of her widowed mother, but retained her father's settlement in Penge, and that the order was right.

A pauper was born in 1861 at her father's birthplace in Wanborough. He died in 1868, and his widow married again. After her father's death the pauper (who was always physically incapable of work) resided with her mother in Rhydgwern without receiving relief till June 1880, when

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she became chargeable. In June 1880 the pauper had so resided at Rhydgwern for more than three years since the Divided Parishes Act 1876 came into operation (15th August 1876); viz. more than one year before she attained the age of sixteen (October 1877), and more than two years after attaining that age. An order having been made adjudging the last legal settlement of the pauper to be in Wanborough:—

Held, reversing the decision of the Court of Appeal (20 Q. B. D. 597) and restoring the decision of Stephen and Charles JJ., that the order was wrong; that the pauper had, by her residence under the age of sixteen coupled with her residence over that age, "resided for the term of three years" in Rhydgwern so as to render her irremoveable, within the meaning of sect. 34 of the Act, and had therefore acquired a statutory settlement in that parish; and that this result was not affected by the provisions of sect. 35.

A pauper resided with her husband in a parish for more than three years continuously, and after his death continued to reside as a widow in the same parish for three months:—

Held, affirming the decision of the Court of Appeal (21 Q. B. D. 278), that the settlement of the pauper and her children (who were all under six years of age) was in that parish, not on the ground that the pauper had acquired a settlement in her own right under sect. 34 of the Divided Parishes Act 1876, but on the ground that the husband had at the time of his death acquired a settlement in the parish under sect. 34, and that his widow and children took that settlement under sect. 35.

THESE three appeals from orders of the Court of Appeal were heard consecutively, each of them depending upon the construction of the Divided Parishes Act 1876 (39 & 40 Vict. c. 61), of which sects. 34 and 35 are as follows:—

34. "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremoveable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or Court think sufficient."

35. "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take

the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

In the first appeal, *Reigate Union* v. *Croydon Union*, the following facts were stated in a special case under 12 & 13 Vict. c. 45 s. 11 for the opinion of the Queen's Bench Division.

On the 8th of May 1886, upon the application of the Reigate Union, two justices of the county of Surrey made an order under sect. 97 of 16 & 17 Vict. c. 97 adjudging the place of the last legal settlement of Edith Scully to be in the hamlet of Penge in the Croydon Union.

Edith Scully the pauper lunatic was born about the year 1875, and was therefore under the age of sixteen when the order was made. She was the lawful daughter of Richard Scully (deceased) and his wife Emma Scully, and had never acquired any settlement in her own right.

Emma Scully was born in the parish of Reigate foreign in the Reigate Union. She had never acquired any subsequent settlement in her own right.

Her husband Richard Scully, whilst resident with her about the year 1878, acquired a settlement in the hamlet of Penge in the Croydon Union by renting a tenement and being charged with and paying rates and taxes, and thereupon Emma Scully and Edith Scully took the said settlement of Richard Scully. None of them ever acquired any subsequent settlement in any other parish or place.

In 1880 Richard Scully left England for Gibraltar where in 1881 he was joined by his wife who resided there ever since. In 1881 Richard Scully died at Gibraltar.

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The Croydon Union contended that the pauper lunatic was not settled in the hamlet of Penge but took the maiden settlement of her "widowed mother" Emma Scully, viz., that of her birth in the parish of Reigate foreign in the Reigate Union.

The Reigate Union contended that the pauper lunatic took the settlement of her deceased father, viz., that acquired by him in the hamlet of Penge in the Croydon Union.

The question for the opinion of the Court was: "Was the order rightly made adjudging the settlement of the pauper lunatic to be in the hamlet of Penge?" If the Court should answer this question in the affirmative the order was to be confirmed, if in the negative the order to be quashed.

The Queen's Bench Division (A. L. Smith and Grantham JJ.) quashed the order, and this decision was affirmed by the Court of Appeal (Lord Esher M.R. and Fry L.J.) (1).

Against these decisions the Reigate Union brought the present appeal.

1888. Dec. 13, 14. *Jelf* Q.C. (*R. Burleigh Muir* with him) for the appellants:—

The question turns entirely on sect. 35 of the Divided Parishes Act 1876, the construction of which, difficult enough when the statute was first passed, has become much more so by reason of the conflicting decisions. The statute cannot be understood unless it is read by the light of the law existing when it came into force. The old law is referred to in the judgment of Field J. in *Reg.* v. *Guardians of Bridgnorth* (2). The 13 & 14 Chas. 2 c. 12 was the foundation of the law of settlement. Two kinds of settlement sprang up, original and derivative. The birth-place was to be the settlement, but only for want of a better. A settlement once acquired was retained till it was superseded by another. A child who took his father's settlement did not lose it on his death. Before sect. 35 of the Act of 1876 Edith Scully's settlement would have been her father's. Sect. 35 in abolishing derivative settlements intended to leave a settlement derived by marriage untouched. This view carries out the policy arrived at by the Act of 1876, viz., the non-separation of parents and young

(1) 19 Q. B. D. 385. (2) 9 Q. B. D. 765, 770.

children. The construction adopted by the Court of Appeal defeats this object and effects a separation. That was the result of the decision in *Reg.* v. *Bridgnorth* (1), the effect of which is that children under the age of seven may be separated from their mother and removed to their respective birth-places. It is not denied that the words in sect. 35 "shall be deemed" have reference to an inquiry: but the expression "shall be deemed to *have* derived" must refer to a past time. The words "except in the case of a wife from her husband" mean that the section is not to affect the derivative settlement of a wife from her husband —not merely during their joint lives—but after the husband's death. Those words were not needed if their only application was to be while both are living; for by the previous law a wife could not be separated from her husband. "Wife" therefore includes "widow": otherwise what settlement is the widow to take? No statute before this and no decision sends a widow back to her maiden settlement: such a reversion is unknown to the law. There are certainly no express words in sect. 35 to effect such a reversion, and there is no reason for implying them. Sect. 35 contemplates two periods of time, the present when the question arises, and the past when the thing is to be deemed or not to be deemed to have happened.

The law as to settlement derived by parentage is stated by Coleridge J. in *Reg.* v. *Inhabitants of All Saints, Derby* (2): "It is an established principle that every English subject has" (not will have) "a settlement by birth primâ facie; that is, till an acquired settlement is shewn; until then it is no more than primâ facie; and when it is ascertained that the father or mother has an English settlement, that is the settlement of the child." And see *Cumner* v. *Milton* (3). The Courts below lost sight of the cardinal principle that a settlement once acquired remains till it is superseded, and that every child has a settlement, quite irrespective of whether it becomes chargeable or not. With respect to the words "shall take the settlement of its father or of its widowed mother, as the case may be," the settlement of its father is not necessarily the same as that of its widowed mother, for the

(1) 9 Q. B. D. 765, 11 Ibid. 314.
(2) 14 Q. B. at p. 216.
(3) 2 Bott & Const. Poor Laws, 6th ed. p. 11; 2 Salk. 528; 3 Ibid. 259.

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widowed mother may acquire another settlement for herself, and it is only in that case that the child takes the settlement of its widowed mother: per Lord Coleridge in *Guardians of Liverpool* v. *Overseers of Portsea* (1). As to the old law with regard to a married woman's settlement see *R.* v. *St. Botolph* (2). The words "shall take and shall *retain* the settlement," recognise the existing law that every child had a settlement whether it actually became chargeable or not, and mean that the child shall take always. That a derivative settlement taken by a child under sixteen is retained beyond sixteen was held in *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union* (3).

The second clause of sect. 35, as to illegitimate children, must be read with 4 & 5 Will. 4 c. 76 s. 71, otherwise it is unintelligible. As to the position of bastards under the earlier statute see *Overseers of Bodenham* v. *Overseers of St. Andrew's* (4). The decision in *Reg.* v. *Guardians of Marylebone* (5) upon this clause gives no meaning to the words "shall *retain*."

The third clause of sect. 35 applies only to independent units: "Any child in this section mentioned" means any child over sixteen. This is necessarily so from the following words, for children under sixteen do not usually acquire a settlement for themselves, and females under sixteen do not usually marry. The third clause abolishes double derivative settlements in children over sixteen, and does no more. This is the only construction that reconciles the whole section.

As to the decisions upon sect. 35, it is impossible to reconcile them. *Guardians of Liverpool* v. *Overseers of Portsea* (6) is precisely in point and should govern the present case. The decisions in *Guardians of Maidstone Union* v. *Guardians of Holborn Union* (7), and in *Guardians of Kingsbridge Union* v. *Guardians of East Stonehouse* (8) are wrong and those cases should be overruled.

[The following cases were also discussed:—

Guardians of Headington Union v. *Guardians of St. Olave's*

(1) 12 Q. B. D. 303.
(2) Burr. Sett. Cas. 367.
(3) 20 Q. B. D. 597.
(4) 1 E. & B. 465.
(5) 13 Q. B. D. 15.
(6) 12 Q. B. D. 303.
(7) 17 Q. B. D. 817.
(8) 18 Q. B. D. 528.

Union (1); *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (2); *Guardians of St. Pancras* v. *Guardians of Norwich Incorporation* (3); *Guardians of Amersham Union* v. *Guardians of City of London Union* (4); *Guardians of Dorchester Union* v. *Guardians of Poplar Union* (5); *Guardians of Medway Union* v. *Guardians of Bedminster Union* (6); *Guardians of Northwich Union* v. *Guardians of St. Pancras Union* (7). LORD WATSON referred to *Adamson* v. *Barbour* (8).]

1889. May 6. Sir *E. Clarke* S.G. and *Poland* Q.C. (*Mead* with them) for the respondents:—

In sect. 35 the word "wife" means "wife" and does not include widow. The true construction is that the wife retains her husband's settlement only during coverture; when she becomes a widow, her maiden settlement revives. This construction carries into effect the policy which the legislature had in view, namely, to keep the family together. If the widow retained the settlement derived from her husband she might be separated from her children; for the enactment that the child shall take the settlement of its widowed mother is subject to the exception in the final clause of sect. 35, which precludes inquiry into the derivative settlement of a parent for the purpose of determining the settlement of a child. Again the section expressly provides that a child shall retain its derivative settlement until it gains another, but says nothing as to the widow retaining her settlement by marriage.

With one exception all the authorities are in the respondents' favour. It was decided in *Guardians of Maidstone Union* v. *Guardians of Holborn Union* (9) and in *Guardians of Kingsbridge Union* v. *Guardians of East Stonehouse* (10) that on the death of the husband the widow reverts to her maiden settlement. But assume that Emma Scully does retain her husband's settlement, that is a derivative settlement which cannot be inquired into for the purpose of ascertaining the settlement of the pauper, Edith Scully:

(1) 13 Q. B. D. 293.
(2) 15 Q. B. D. 95, 339.
(3) 18 Q. B. D. 521.
(4) 20 Q. B. D. 103.
(5) 21 Q. B. D. 88.
(6) 21 Q. B. D. 278.
(7) 22 Q. B. D. 164.
(8) 1 Macq. 376.
(9) 17 Q. B. D. 817.
(10) 18 Q. B. D. 528.

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Guardians of Northwich Union v. *Guardians of St. Pancras Union* (1).

Jelf Q.C. in reply:—

There can be no revival of the maiden settlement when once a new one has been gained by marriage. The doctrine laid down in *Rex* v. *Norton* (2), that a settlement might be suspended and afterwards revived, was overruled in *Rex* v. *St. Botolph* (3). The last settlement only can be inquired into; if that is gone the widow is left without any settlement at all. The words in sect. 35, "of its father or of its widowed mother as the case may be" are used with reference to the previous law, under which it was held that a child retained its father's settlement, unless and until the widowed mother acquired a new one before the child's emancipation. Failing that event the child derives its settlement from the father, not the mother, and the case of double derivation referred to in the last clause of the section does not arise.

In the second appeal, *Highworth and Swindon Union* v. *Westbury-on-Severn Union*, the following facts were stated in a special case for the opinion of the High Court on an appeal against the order of removal mentioned below:—

The pauper, Eliza Wait, was the lawful daughter of Charles and Matilda Wait, and was born in the parish of Wanborough in the Highworth and Swindon Union on the 27th of October 1861. Charles Wait was also born in the parish of Wanborough.

Charles Wait, his wife, and Eliza Wait left Wanborough about the year 1862 and went to reside at the parish of Rhydgwern in the county of Glamorgan in the Newport Union. Charles Wait died at Rhydgwern in August 1868. After his death his widow and daughter continued to reside at Rhydgwern, and in 1871 the widow married one Gibbs or Gibson, and resided with him at Rhydgwern, and he died there in 1884.

Matilda Gibbs or Gibson was married to a third husband in November 1885, and in that month went with her husband and

(1) 22 Q. B. D. 164.
(2) Burr. S. C. 122.
(3) Burr. S. C. 367; 2 Bott & Const. Poor Laws, 6th ed. pp. 18, 69.

the pauper to reside at Adsett in the parish of Westbury-on-Severn in the Westbury-on-Severn Union in the county of Gloucester.

The pauper attained the age of sixteen years on the 27th of October 1877. She resided continuously with her mother at the parish of Rhydgwern from the year 1862 up to the 5th of June 1880 without ever having received relief. She was in receipt of relief from the Newport Union from the 5th of June 1880 up to the time of her going to Adsett in November 1885.

The pauper resided for more than three whole years after the passing of the Act (39 & 40 Vict. c. 61) in the parish of Rhydgwern, viz., three years and ten months from the 15th of August 1876, when the above Act came into operation, until she became chargeable on the 5th of June 1880; being one year and two months whilst under sixteen years of age, and two years and eight months after she attained that age.

The pauper became chargeable to the Westbury-on-Severn Union in September 1886. The Westbury-on-Severn Union in March 1887 obtained an order for her removal to the Highworth and Swindon Union on the ground that the parish of Wanborough was the birth-place and last legal settlement of Charles Wait, the father, and the pauper.

The pauper had always resided with her mother, and had always been physically incapable of work.

Judgment was to be entered in conformity with the decision of the High Court.

The Queen's Bench Division (Stephen and Charles JJ.) gave judgment for the Highworth and Swindon Union and quashed the order of removal. This decision was on appeal reversed by the Court of Appeal (Lord Esher M.R., Fry and Lopes L.JJ.) (1).

The Highworth and Swindon Union brought the present appeal.

May 6, 7. *Lumley Smith* Q.C. and *R. Cunningham Glen* for the appellants:—

By sect. 34 of the Divided Parishes Act 1876 it is enacted that a settlement shall be acquired by residence for three years under

(1) 20 Q. B. D. 597.

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such circumstances as would in accordance with previous statutes confer irremoveability. The statutes referred to are 35 Geo. 3 c. 101 s. 1, 9 & 10 Vict c. 66 s. 1, 24 & 25 Vict. c. 55 s. 1, and 28 & 29 Vict. c. 79 s. 8. Here the condition exists for the acquisition by the pauper of a settlement under sect. 34; for the residence of a child with its parents is good residence for that purpose: *Reg.* v. *Elvet* (1); see also *Reg.* v. *Cudham* (2); *Reg.* v. *Glossop* (3); *Overseers of Easton* v. *Overseers of St. Mary, Marlborough* (4); decisions on the statutes as to irremoveability, and *Guardians of Medway* v. *Guardians of Bedminster* (5) since the Divided Parishes Act. But the Court of Appeal have held that sect. 34 is controlled by sect. 35 and applies only to persons over sixteen years old, because by sect. 35 a child under that age is to take its parents' settlement, and the Court assumed that such a child could not acquire a settlement for itself. But the true construction of sect. 35 is that it intended to deal only with the question of derivative settlement, not to take away the capacity of a child to acquire a settlement in its own right. The provision that a child shall retain the parents' settlement until it acquires another was inserted to avoid the construction which had been placed on 4 & 5 Will. 4 c. 76 in *Overseers of Bodenham* v. *Overseers of St. Andrew's Worcester* (6), where it was held that on attaining sixteen a bastard child was removeable to the place of its birth. Under the old law a settlement could be acquired by a child under sixteen: *Rex* v. *Inhabitants of Bleasby* (7); and it has been decided in *Reg.* v. *Leeds Union* (8), as to illegitimate children, and in *Woolstanton and Burslem Union* v. *Northwich Union* (9), as to legitimate children, that sect. 35 had made no change in that respect. See also *Holborn* v. *Chertsey* (10), reversed by the Court of Appeal (11) on a question of fact only, and per Denman J. in *St. Pancras* v. *Norwich* (12). If the decision appealed against is right the third paragraph of sect. 35 is inconsistent, for it contemplates a child acquiring a settlement; besides it would logically

(1) 2 E. & E. 266.
(2) 1 E. & E. 409.
(3) 12 Q. B. 117.
(4) Law Rep. 2 Q. B. 128.
(5) 20 Q. B. D. 191; 21 Q. B. D. 278.
(6) 1 E. & B. 465.
(7) 3 B. & Ald. 377.
(8) 4 Q. B. D. 323.
(9) 46 L. T. (N.S.) 528.
(10) 14 Q. B. D. 289.
(11) 15 Q. B. D. 76.
(12) 18 Q. B. D. 521, 526.

follow that a female marrying under sixteen would retain the parents' settlement and would not acquire that of her husband.

It is also contended that the Divided Parishes Act operated retrospectively and that the father and mother must be deemed to have gained settlements in Rhydgwern and the daughter to have derived a like settlement from them. It has been held that the Act is not retrospective, but the words of sect. 34 "shall have resided" are quite general.

H. D. Greene Q.C. and *Fraser Macleod* for the respondents:—

Sects. 34 and 35 were intended to form a new code. The present case falls under sect. 35. The legislature meant that a child under sixteen should no longer have any power to acquire a settlement in its own right. The interpretation put upon sect. 35 by *Guardians of Dorchester Union* v. *Guardians of Poplar Union* (1) and *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (2), is the right one. The pauper was settled in the appellant parish either by her father's settlement or her own birth settlement; it matters not which. The reasoning of the Court of Appeal represents the respondents' argument. Then it is argued contrà that the case comes under sect. 34. But an unemancipated child cannot acquire a settlement for itself. In each of the authorities relied on by the appellants, *Reg.* v. *Elvet* (3), *Reg.* v. *Leeds* (4), *Holborn* v. *Chertsey* (5), and *Woolstanton, &c.* v. *Northwich Union* (6), the child was emancipated, by death, abandonment or otherwise. It is not merely the residence but the character of the residence that has to be looked at.

Again the residence must be with the intention to reside, and a child of mental or physical incapacity, such as was the case here, cannot be emancipated or acquire a residence for itself: *R.* v. *Inhabitants of Broadhembury* (7); *R.* v. *Inhabitants of Much Cowarne* (8).

[They also referred to *Reg.* v. *St. Ann, Blackfriars* (9); *Reg.*

(1) 21 Q. B. D. 88.
(2) 15 Q B. D. 95, 339.
(3) 2 E. & E. 266.
(4) 4 Q. B. D. 323.
(5) 14 Q. B. D. 289.
(6) 46 L. T. (N.S) 528.
(7) 4 Doug. 241.
(8) 2 B. & Ad. 861.
(9) 2 E. & B. 440.

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GUARDIANS OF HIGHWORTH AND SWINDON UNION v. GUARDIANS OF WESTBURY-ON-SEVERN UNION.

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v. *St. Olave's* (1); *Guardians of Salford* v. *Overseers of Manchester* (2).]

R. Cunningham Glen in reply:—

The allegation of incapacity implies no mental imbecility. Moreover a congenital imbecile—not an idiot—is capable of acquiring a settlement for herself: *Nixon* v. *Rowand* (3) following *Cassells* v. *Somerville & Scott* (4). A physical residence is sufficient—even on a doorstep: the absence of a home to return to is not material.

[They also referred to *Dumbleton* v. *Beckford* (5), and *St. Michael-in-Norwich* v. *St. Matthew-in-Ipswich* (6).]

In the third appeal, *Medway Union* v. *Bedminster Union*, the following facts appeared in a special case stated from Bristol quarter sessions upon an appeal against an order for the removal of Caroline Baker, widow, with her three children aged respectively five, three, and two years, from the Bedminster Union to the Medway Union as the place of their last legal settlement:—

The pauper, Caroline Baker, and her husband had resided together continuously in the parish of Gillingham in the Medway Union for upwards of three years immediately before the death of her husband, which took place in March 1886, and she continued to reside as a widow for three months after his death in the said parish. The widow and her children afterwards became chargeable to the Bedminster Union.

The Recorder of Bristol held that the pauper had acquired a settlement in the parish of Gillingham under sect. 34 of the Divided Parishes Act 1876, and confirmed the order of removal.

The question for the opinion of the Court was whether the pauper had gained a settlement in the Medway Union; Judgment to be entered accordingly.

The Queen's Bench Division (Pollock B. and Hawkins J.) affirmed the order of removal (7), and this decision was on appeal

(1) Law Rep. 9 Q. B. 38.
(2) 10 Q. B. D. 172.
(3) 15 Court Sess. Cas. 4th Series, 191.
(4) 12 Court Sess. Cas. 4th Series, 1155.
(5) 2 Salk. 470; 2 Bott & Const's Poor Laws, ch. 2, s. 56, 6th ed. p. 26.
(6) Ibid. p. 27.
(7) 20 Q. B. D. 191.

affirmed by the Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ.) (1).

Against these decisions the Medway Union brought the present appeal.

May 7. Sir *E. Clarke* S.G. and *R. A. Kinglake* for the appellants:—

The question here arises under sect. 34. It is admitted by the appellants that the pauper had resided with her husband for more than three years in the appellants' union. But this is not such a residence as is intended by sect. 34. "Any person" does not include a married woman, dependent on her husband. A husband can acquire a settlement for himself: but a wife cannot acquire a settlement for herself. As soon as she becomes a widow she takes her maiden settlement. While the husband lives the intention was to keep him and the wife together. After his death that object fails and then there is no reason for maintaining the derivative settlement. It could not have been intended that during her husband's life she should acquire a status of irremoveability, for if so and he went away and became chargeable elsewhere they would be separated, she could not be removed with him. If sect. 34 were read otherwise it would abolish all the prior law. The authorities in favour of the appellants' view: *Reg.* v. *Overseers of Manchester* (2) and *Giles* v. *Evesley Blackwater* (3), may be referred to. "Wife" in sect. 35 does not include widow. The authorities upon sect. 35 have been so fully discussed in the two previous appeals that it is not necessary to cite them again.

Poole Q.C. (*J. Cresswell Wall* with him) for the respondents:—

The question whether "wife" in sect. 35 includes a widow has been so fully discussed in one of the preceding appeals that it is unnecessary to argue any point except the one arising under sect. 34. That section means simply actual residence. *Reg.* v. *Glossop* (4) is a direct authority in favour of the respondents' contention upon this point: see also *Reg.* v. *St. George's-in-the-*

(1) 21 Q. B. D. 278.
(2) 8 Q. B. D. 50.
(3) 1 Stra. 580.
(4) 12 Q. B. 117.

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East (1) decided under 9 & 10 Vict. c. 66 s. 1 and 11 & 12 Vict. c. 111, s. 1, and *Reg.* v. *Weymouth* (2), and *Reg.* v. *East Stonehouse* (3). Even if an unemancipated child cannot acquire a settlement that does not conclude the case of a wife.

Sir *E. Clarke*, S.G. in reply.

The House took time for consideration in all three appeals.

Aug. 8. LORD HALSBURY L.C.:—

My Lords, in the case of the *Reigate Union* v. *Croydon Union* an order has been made by the justices of Surrey adjudging the settlement of a lunatic pauper in the Croydon Union. The lunatic was at the time of the order under sixteen years of age and was the daughter of a father who was settled in the Croydon Union. The mother's maiden settlement was in the Reigate Union and was a settlement by birth, and since her husband's death five years before the order appealed against she had acquired no settlement in her own right.

Under these circumstances no question could have arisen under the law as it stood before the passing of 39 & 40 Vict. c. 61. But it is said that sect. 35 of that Act has altered the law in respect of the wife's retaining the settlement with which by marriage she has become invested.

At first sight it seems strange that when the express language of the section relied upon to effect this change excepts from its operation the case of a wife's settlement derived from her husband, it should be supposed that these words make the very change which their ordinary meaning would seem to be expressly intended to prevent. But the reasoning appears to be this,—that the word "wife" imports a living husband because the appropriate word for a woman whose husband is dead is "widow," and the same section speaks of a "widowed mother."

Whether the phrase "derived from her husband" is the most strictly accurate language to describe the status which the wife acquires upon marriage, I will not stay to inquire, since what-

(1) Law Rep. 5 Q. B. 364. (2) 16 Q. B. D. 31.
(3) 3 E. & B. 596; 24 L. J. (M.C.) 121.

ever be the true construction of the section it is obvious that the legislature has used the phrase in relation to that subject: but assuming it to be accurate one cannot but inquire in what other way could the exception be worded so as to preserve to the widow the rights which she had acquired as a wife.

Neither in this nor in any other branch of the law does the status acquired by the wife in marriage terminate with the death of the husband though it is by being a wife she acquires it, and certainly not as a widow.

If the legislature was pointing to the rights acquired by marriage it must use the word "wife," since it was only as a wife that those rights could be acquired. The reason for the use of the words "widowed mother" in the same section was obvious enough. If the child's father were alive it would take its father's settlement; but if the father were dead then its mother's, who in that case would be a "widowed mother."

I am therefore very clearly of opinion that the order was wrong and that the appellants are entitled to succeed. I move your Lordships accordingly.

For the same reasons I think that in the third case, viz. the *Medway Union* v. *Bedminster Union*, the order appealed from ought to be affirmed.

In that case the husband of the pauper, the father of the children, was settled in the parish of Gillingham—it is immaterial to inquire how. Upon his death the wife retained his settlement, and with her children subsequently became chargeable to the Bedminster Union, never having herself any other settlement than that in the parish of Gillingham. I think they were therefore properly removed to that parish, and I move your Lordships that the appeal from the judgment affirming the propriety of that removal be dismissed with costs.

The second case, that of the *Highworth and Swindon Union* v. *Westbury-on-Severn Union*, I think is concluded by the authority of Lord Campbell and Wightman and Erle JJ., which I should be very sorry to see disturbed. I agree with Stephen and Charles JJ. that the case of *Reg.* v. *Elvet* (1) determines and rightly determines the question in debate.

(1) 2 E. & E. 266.

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The pauper had by more than the necessary period of residence acquired a status of irremoveability, and so was "settled" in the parish of Rhydgwern. It is true that during a part of that period she was under sixteen years of age, and it is true that if it be assumed, as it was by the Court of Appeal, that unemancipated residence will not suffice, then she had not accomplished the necessary period of emancipated residence. The statute knows no such distinction. It makes the emancipated and unemancipated equally irremoveable, and if so the periods of emancipated and unemancipated residence may be put together.

It is clear therefore that in this case there was for more than three years a status of irremoveability in each of the three years, and therefore the pauper acquired a settlement, and the judgment of the Queen's Bench Division is right.

I accordingly move your Lordships to reverse the judgment of the Court of Appeal reversing the judgment of the Queen's Bench Division; that the judgment of the Queen's Bench Division be restored; and that the respondents do pay to the appellants the costs both here and below.

LORD WATSON :—

My Lords, these appeals, which were heard together, all depend upon the construction of the leading clauses of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), relating to the settlement of paupers. I think it will be convenient, first of all, to indicate my own views with regard to the meaning and effect of the 34th and 35th sections of the statute, and then to deal with their application to the particular facts of each case.

The interpretation of sect. 34 is not attended with difficulty, and has not given rise to any serious difference of opinion in the Courts below. The Act 9 & 10 Vict. c. 66 s. 1 provided that (subject to certain conditions as to quality of residence, &c.) no person should be removeable from a parish in which he had resided for the five years immediately preceding the application for a warrant of removal. The period of three years was substituted for that of five by 24 & 25 Vict. c. 55 s. 1, which also enacted that residence for the requisite period in any part of a

union should have the same effect as residence in a single parish within it. The length of residence necessary to confer the privilege of irremoveability was by 28 & 29 Vict. c. 79 s. 8 reduced to one year. Such was the statutory rule with respect to irremoveability at the time when the Act of 1876 was passed. Sect. 34 does not trench upon the previous law regarding irremoveability, but creates a new species of settlement by residence. It enacts that a person who resides in a "parish" for three consecutive years, shall, if his residence during each of these years has been such as would, in accordance with the statutes already referred to, render him irremoveable, be "deemed to be settled therein," until he acquires a new settlement in another parish, by a like residence or otherwise.

Sect. 35 contains three separate clauses, the first of which abolishes derivative settlement, subject to certain exceptions in the cases of married women and legitimate children. The second gives to illegitimate children the right to retain their mother's settlement until they acquire another, and the third imposes a limitation upon the provisions of the two preceding clauses in favour of children, by enacting that, in certain events, the child, whether legitimate or illegitimate, is not to have the benefit of its parent's settlement, when that settlement is itself derivative.

The provisions made by way of exception in the first of these clauses, with respect to the derivative settlements of married women and legitimate issue, have occasioned much difference of opinion. Since the passing of the Act there have been numerous decisions upon the import of the exceptions by Divisional Courts and in the Court of Appeal, but these authorities are marked by such a degree of fluctuation and inconsistency that I do not think any advantage can be gained by referring to them. I may observe, however, that the structure of the clause, which begins with the sweeping declaration that "no person shall be deemed to have derived a settlement from any other person whether by parentage, estate, or otherwise," has induced many of the learned judges to favour a construction of the excepted cases which appears to me to be unduly severe. The language used by the legislature to describe the exceptions is not per se definitive, and is only intelligible by reference to the pre-existing law applicable

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to settlements by marriage or parentage. The fact that the legislature has resorted to the convenient form of first abolishing the whole and then excluding what it was intended to retain, does not necessitate a narrow reading of the exceptions. These ought, in my opinion, to be construed according to their ordinary and natural meaning, just as if they had stood alone or had been positive enactments.

The words of exception are, "except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father, or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

The settlement which "a wife" derives "from her husband" is expressly saved, and that in terms which aptly describe a woman's settlement by marriage, according to the previous law, one quality of which was that it adhered to her after her husband's death, until she acquired a new settlement. But it has been held, in some of the decided cases, that the use of the word "wife" implies that a "widow" is no longer to take a settlement from her husband, but loses it immediately on his decease, a view which is said to be confirmed by contrasting "wife" with "widowed mother," as used in relation to the settlement of children under the age of sixteen. The result of that construction is that, on the father's death, the widowed mother at once reverts to her maiden settlement, to which the children in nonage also become chargeable. I can find nothing in the language of the clause to warrant the inference that it was intended to deprive a widow of the benefit of her husband's settlement, and to throw the burden of supporting her and their family upon the parish of her birth until she acquires a new settlement. The marriage settlement of a widow was that which she took, not as a widow from a dead husband, but as a wife from her living husband. In other words, the settlement which she retained after his death was one derived by a wife from a husband, and is therefore within the precise words of the exception.

So far as it concerns the settlement of lawful children the clause introduces a very important alteration of the law. It puts an end to all nice questions as to emancipation or non-

emancipation, by enacting that, on attaining the age of sixteen every child shall, without regard to its physical or mental capacity, cease to follow its parent's settlement, and become capable of acquiring a settlement in its own right. The clause leaves the old law applicable to parentage settlements unchanged in all other respects. The words, "or of its widowed mother as the case may be," do not, in my opinion, amount to a declaration that the child must, on its father's death, at once shift to the maiden settlement of its mother. They obviously refer to the existing law, and are perfectly intelligible as referring to the well known rule that, after the death of the father, unemancipated children take the benefit of any primary settlement which their widowed mother may acquire for herself.

The second clause of sect. 35 enacts that "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement." It had already been enacted by 4 & 5 Will. 4 c. 76 s. 71 that such a child shall have and follow the settlement of its mother until it attains the age of sixteen, or acquires a settlement in its own right; and it had been decided in *Bodenham* v. *St. Andrew, Worcester* (1), that by virtue of that enactment a bastard only retained its mother's settlement until sixteen, and after that age was removeable to the parish of its birth. It was also decided in *Reg.* v. *St. Mary, Newington* (2), that under the Act of William a bastard under sixteen took not only such settlements as its mother might acquire in her own right, but also (in that respect differing from a lawful child) the settlement of any husband whom she might marry. Making due allowance for the differences arising from the circumstance that in law a bastard has no father, the practical effect of the second clause of sect. 35 is to place illegitimate, as nearly as may be, on the same footing with legitimate children.

The third clause applies to children of both classes. It enacts that, "If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have acquired a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent,

(1) 1 E. & B. 465. (2) 4 Q. B. 581.

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such child or female shall be deemed to be settled in the parish in which he or she was born." The object of the enactment is to impose a limit upon parentage settlements by double derivation, by providing that children emancipated shall not retain their derivative parentage settlement, where the settlement of their parent is also derivative; but shall, in the event of their becoming paupers without having acquired a new settlement, be chargeable to the parish of their birth. The provisions of the clause have, in my opinion, no application to children under the age of sixteen, and do not qualify the preceding enactment of sect. 35 to the effect that a legitimate, or that of 4 & 5 Will. 4 to the effect that an illegitimate, child shall continue to retain its parentage settlement until it has reached that age. The clause assumes that the children whose settlements are the subjects of inquiry are not unemancipated, but are paupers in their own right, and capable of acquiring a settlement for themselves.

The views which I have thus expressed with reference to the construction of sect. 35 are not exhaustive, but they are sufficient to dispose of all the questions of law arising in these appeals. Shortly stated, my opinion comes to this, that the effect of sect. 35 is (1) to reserve to married women, whether during marriage or in viduity, the same right to their husband's settlement which they had under the law existing at the time when the Act was passed; (2) to fix absolutely the age of sixteen as the period of emancipation, in all questions regarding the settlement of legitimate children as had already been done in the case of illegitimates; (3) to give to bastards the privilege enjoyed by lawful children of retaining their parentage settlement after emancipation until the acquisition of a new settlement; (4) in all cases where the parents' settlement was itself derivative, to throw children of either class as soon as they attain the age of sixteen upon their own birth settlement until they acquire another; (5) subject to these provisions and limitations to reserve to children the same rights in relation to parentage settlement which they possessed under the then existing law; and (6) to abolish all other kinds and forms of derivative settlement.

I shall now proceed to deal separately with these appeals, and with the facts presented for judgment in each of them.

In the first of them, the pauper, the liability for whose maintenance is the subject of controversy, is a lunatic girl whose father died in 1881, having in the year 1878 acquired a settlement in the respondent union, which he never lost, by renting a tenement and being charged with and paying rates and taxes. Her mother, who is still alive, had her maiden settlement by birth in the appellant union; and she has not acquired any settlement since her husband's death. On the 8th of May 1886 an order was made by two justices of the county of Surrey adjudging the settlement of the pauper, who was at that time under the age of sixteen, to be in the respondent union. Their order was quashed by a Divisional Court and by the Court of Appeal, upon the ground that the pauper on her father's death took the maiden settlement of her widowed mother (1). For the reasons already explained I am of opinion that the pauper after his death retained her father's settlement in the respondent union, and that the judgment appealed from ought therefore to be reversed.

In the second appeal the facts are as follows: The pauper was born on the 27th of October 1861 in Wanborough, her father's birth parish, which is within the appellant union. In 1862 she removed with her father to the parish of Rhydgwern, in Newport Union, where she resided with him until his death in August 1868. Her mother married in 1871 one John Gibbs or Gibson, who died in 1884; and in November 1885 she was again married to her present husband. From the time of her father's death until her mother's third marriage the pauper, who is physically incapable of work, continued to reside with her mother in the parish of Rhydgwern, and from the 5th of June 1880 she was in receipt of relief from Newport Union until the 9th of November 1885 when she went with her mother to the parish of Adsett in the respondent union, to which she became chargeable in September 1886. On the 18th of March 1887 the guardians of the respondent union obtained an order for her removal to the appellant union, on the ground that the parish of Wanborough was the birthplace, and last legal settlement, both

(1) 19 Q. B. D. 385.

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of the pauper and of her father, seeing that the residence of the latter in Rhydgwern was prior to the Act of 1876. It was, therefore, unnecessary to determine whether the pauper took her own or her father's birth settlement if she had not acquired a new settlement of her own after emancipation.

The pauper attained the age of sixteen on the 27th of October 1877. When she became chargeable to the respondent union in June 1880 she had resided in Rhydgwern for nearly four years without ever having received relief, and for two years and ten months of that period she was above sixteen years of age. In these circumstances a Divisional Court, consisting of Stephen J. and Charles J. quashed the order of removal, holding on the authority of *Reg.* v. *Elvet* (1) that the pauper had in each of the three years preceding the 5th of June 1880 acquired by residence a status of irremoveability, and that she had consequently at that date acquired a settlement in her own right in Newport Union under the provisions of sect. 34. Their judgment has been reversed, and the order of removal affirmed by the Court of Appeal (2), who were of opinion (1) that the pauper retained her birth settlement in the parish of Wanborough until she acquired another, and (2) that she had not acquired a settlement in Rhydgwern, because unemancipated residence cannot be taken into account in ascertaining the period of previous residence necessary to entitle an emancipated child to a settlement in terms of sect. 34.

I have been unable to find in sect. 34 any provision, express or implied, to the effect that an emancipated child claiming a settlement under its provisions is not to have the benefit of residence whilst it was under the age of sixteen. The only provision having a bearing upon the point is to be found in sect. 35, which enacts that until emancipation the child "shall retain" the settlement of its father or widowed mother. That provision does not necessarily imply that on attaining sixteen the child is not to have the benefit of previous residence; but even if it pointed to that result, I do not think that any mere implication derivable from it can be permitted to override the express enactment of sect. 34. The only test of residence sufficient to give

(1) 2 E. & E. 266. (2) 20 Q. B. D. 597.

"any person" a settlement under that section is that it shall be such as would "in accordance with the several statutes in that behalf render him irremoveable"; and the case of *Reg.* v. *Elvet* (1) is a clear authority to the effect that the pauper's residence under sixteen, coupled with her residence after she attained that age, did render her irremoveable in accordance with these statutes. The pauper having admittedly acquired no settlement after June 1880, must at the date of the order of removal have retained the statutory settlement which she had gained by residence in Rhydgwern; and I am, therefore, of opinion that in this case the judgment of the Court of Appeal ought to be reversed, and that of the Queen's Bench Division restored.

The facts of the third appeal appear to me to raise an issue which may be very easily disposed of. Frederick William Baker died on the 25th of March 1886 in the parish of Gillingham, in the appellant union, having resided there continuously with his wife and family for more than three years before his death, after which event his widow continued to reside with her children in the same parish for three months. She and three children all under six years of age subsequently became chargeable to the respondents, who obtained an order for their removal to the appellant union on the ground that the widow had, in the circumstances, acquired a settlement in her own right in the parish of Gillingham by virtue of sect. 34, and that order has been affirmed on the same ground in both Courts below. I concur in their conclusion, but I cannot assent to the reasons assigned for it. I am of opinion, with Lopes L.J. (2), that the father having at the time of his death acquired a settlement in Gillingham under sect. 34, his widow and children took his settlement under the provisions of sect. 35. During the subsistence of her derivative settlement I do not think the widow had the capacity to acquire by residence another settlement of the same quality and in the same parish.

LORD FITZGERALD:—

My Lords, I have had an opportunity of reading and considering the excellent judgment which has just been delivered by my

(1) 2 E. & E. 266. (2) 21 Q. B. D. 278, 282.

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noble and learned friend opposite (Lord Watson), and I concur in the interpretation which he has put upon sects. 34 and 35. I also concur in the conclusions at which he has arrived upon the three appeals before us.

LORD MACNAGHTEN:—

My Lords, the question in these cases depends upon the true construction of sects. 34 and 35 of the Divided Parishes and Poor Law Amendment Act 1876. The latter section has led to great divergence of opinion, and has provoked much unfavourable criticism.

Patchwork legislation is never quite satisfactory. But I rather doubt whether the enactment under consideration deserves all the hard things that have been said of it. I cannot help thinking that no small part of the difficulty which seems to surround sect. 35 is due to the gloss which was put upon it in the *Bridgnorth Case* (1).

The section begins by stating that "no person shall be deemed to have derived a settlement from any other person" with two exceptions. For some reason or other the learned judges in the *Bridgnorth Case* (2) appear to have thought that the section began too abruptly, and that it would be the better for something in the way of introduction. Accordingly they held that it was to be construed as if it were prefaced by the words, "In any question of the removal of a pauper." They then determined that "the moment of time which governs the question of settlement is the time when the proper persons have to make up their minds as to the removal, in other words, the moment of adjudication," and that the expression "no person" means "the person whose case is under discussion and who is to be removed": See *Reg.* v. *Guardians of Bridgnorth* (2); *Guardians of Croydon* v. *Guardians of Reigate* (3).

My Lords, I must say that I can find nothing in the Act which suggests or justifies this construction. It has, I think, given rise to great difficulty and confusion in dealing with the two exceptions to the general rule abolishing derivative settlements.

(1) 9 Q. B. D. 765. (2) 11 Q. B. D. 320.
(3) 19 Q. B D. 388.

The first exception is "in the case of a wife from her husband." Those words seem plain enough. The wife is deemed to take her settlement from her husband. What happens if the husband dies in the lifetime of the wife? There is nothing in the Act, nothing in the general law before the Act was passed, nothing, I think, in the reason of the thing, to deprive her of her settlement. But in obedience to the rule laid down in the *Bridgnorth Case* (1) it has been held that if a question of settlement arises in the case of a widow, the Court is bound to regard her position at the moment of adjudication, and then it is said at that moment she is no longer a wife, and therefore not within the first exception.

The second exception is "in the case of a child under the age of sixteen, which child," the enactment declares "shall take the settlement of its father, or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." Again, apart from the rule laid down in the *Bridgnorth Case* (1), those words are reasonably plain; and notwithstanding that rule, I think they were rightly construed by Lopes L.J., delivering the judgment of the Court in the *Highworth and Swindon Case* (2). Every child up to the age of sixteen takes the settlement of the father, but if the father dies while the child is under sixteen and the mother being a widow acquires a settlement in her own right before the child attains that age, or, I suppose, if the deceased father had no settlement, the child takes the settlement of its widowed mother up to the age of sixteen. In either case, whether it takes the settlement of the father or of the mother, it retains the settlement so taken until it acquires another.

So far I can see no difficulty in the section.

Up to this point the section deals with the case of legitimate children only. It then proceeds to deal with the case of illegitimate children. The only obscurity in this part of the section lies in its brevity. "An illegitimate child," it says, "shall retain the settlement of its mother until such child acquires another settlement." And it says nothing more.

But then it must be remembered that it had been already

(1) 11 Q. B. D. 320. (2) 20 Q. B. D. 597.

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enacted that an illegitimate child should "have and follow" the settlement of its mother until it attained the age of sixteen or acquired a settlement in its own right (4 & 5 Will. 4 c. 76 s. 71); and it had been decided by the Queen's Bench in *Bodenham* v. *St. Andrew's* (1) that when an illegitimate child attained sixteen without having acquired a settlement in its own right, its birth settlement revived. The object of this part of sect. 35 seems to have been to get rid of that decision, and to place illegitimate children as far as possible in the same position as legitimate children.

I now come to the third part of the section, which certainly is not free from difficulty. It declares that "if any child in this section mentioned" (that is, as I understand it, if any child, whether legitimate or illegitimate, who has derived a settlement from a parent) "shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

This part of the section is, I think, directed to a case where it is necessary to shew, and to shew by inquiry, what the settlement of the child is. If the child becomes chargeable and is removeable with its parent or parents, there is no need for any inquiry into the settlement of the child. There is an inquiry into the settlement of the parent, but when that is ascertained there is an end of the matter. I think that this part of the section only applies where there is an independent inquiry into the settlement of the child. In that case the section says, if you find that the settlement of the parent of the child was a derivative settlement, you are not to pursue the inquiry any further. The child is to be deemed to be settled in the place of its birth. I agree with what was said on this point by Mathew J. in *Guardians of Hollingbourne* v. *Guardians of West Ham* (2).

It only remains to apply the provisions of the Act, as I think it ought to be construed, to the three cases under consideration.

(1) 1 E. & B. 465. (2) 6 Q. B. D. 583.

As regards the case of the *Guardians of Reigate Union* v. *Guardians of Croydon Union*, it seems to me clear that the pauper there took the settlement of her father, who acquired a settlement in the Croydon Union, and that, inasmuch as the pauper's widowed mother never acquired a settlement for herself, the pauper retained her father's settlement in the Croydon Union, and therefore I think the decision of the Court of Appeal in that case must be reversed.

In the case of the *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union* I agree with what was said in the judgment of the Court of Appeal as to sect. 35. But I am unable to agree in their opinion that the residence of a child after sixteen cannot coalesce with its residence under sixteen so as to complete the period required for gaining a settlement. The older authorities, of which it is only necessary to mention *Reg.* v. *Elvet* (1), are, I think, decisive upon the point. It appears to me, therefore, that the appeal should be allowed.

In the case of the *Guardians of Medway Union* v. *Guardians of Bedminster Union* I think the appeal must be dismissed. But I agree with Lopes L.J. in thinking that in that case the wife retained the derivative settlement which she took from her husband.

REIGATE UNION *v.* CROYDON UNION.

Order of the Court of Appeal and order of the Queen's Bench Division reversed with costs here and below: Cause remitted to the Queen's Bench Division.

HIGHWORTH AND SWINDON UNION *v.* WESTBURY-ON-SEVERN UNION.

Order of the Court of Appeal reversed with costs here and below: Order of the Queen's Bench Division restored: Cause remitted to the Queen's Bench Division.

(1) 2 E. & E. 266.

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GUARDIANS OF REIGATE UNION v. GUARDIANS OF CROYDON UNION.

GUARDIANS OF HIGHWORTH AND SWINDON UNION v. GUARDIANS OF WESTBURY-ON-SEVERN UNION.

GUARDIANS OF MEDWAY UNION v. GUARDIANS OF BEDMINSTER UNION.

MEDWAY UNION *v.* BEDMINSTER UNION.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals 8th August 1889.

In the first appeal:—

Solicitors for appellants: *Morrisons for G. C. Morrison, Reigate.*

Solicitors for respondents: *West, King, Adams & Co.*

In the second appeal:—

Solicitors for appellants: *Few & Co.*

Solicitors for respondents: *Wilkins, Blyth & Dutton.*

In the third appeal:—

Solicitors for appellants: *Nickinson, Prall & Nickinson for Prall & Son, Rochester.*

Solicitors for respondents: *Guscotte, Wadham & Daw for O'Donoghue & Anson, Bristol.*

[HOUSE OF LORDS.]

JOHN CARTER COLQUHOUN (SURVEYOR OF TAXES) . . . . . APPELLANT;

AND

HENRY BROOKS . . . . . RESPONDENT.

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Revenue—Income Tax—Person resident in the United Kingdom—Trade carried on Abroad—Profits arising or accruing—Profits not remitted to the United Kingdom—5 & 6 *Vict. c.* 35 *ss.* 39, 100, 106, 108—16 & 17 *Vict. c.* 34 *s.* 2, *Sched. D.*

A person resident in the United Kingdom and engaged in a trade carried on entirely abroad is liable to income tax in respect of so much only of the profits of that trade as are received in the United Kingdom.

The respondent, who resided solely in England, was a partner in a firm which carried on business in Australia. Profits were made by the firm, and a portion of the respondent's share thereof was remitted to him in England and on this portion he paid income tax under Sched. D. The larger portion of his share was not remitted to him in England, but was placed to his credit in Australia:—

Held, affirming the decision of the Court of Appeal (21 Q. B. D. 52) but not for the reasons given by the majority of that Court, that the case fell under the head of "possessions in any of Her Majesty's dominions out of Great Britain, or foreign possessions" dealt with by the fifth case of Sched. D in 5 & 6 Vict. c. 35, s. 100; and that the respondent's portion of profits not received in the United Kingdom was not liable to income tax.

APPEAL from a decision of the Court of Appeal (1) on the following case stated under 43 & 44 Vict. c. 19 s. 59 by the Income Tax Commissioners for the city of London for the opinion of the Queen's Bench Division. The assessment was for the year ending the 5th of April 1885.

Mr. Henry Brooks, who resides solely in England, and is a partner in Henry Brooks & Co., of No. 70 Bishopsgate Street Within, merchants, made his return for the firm for income tax in respect of the profits or gains of his said trade, on an average of three years, at the sum of £8294, and was assessed on that sum, and paid the tax thereon. He returned and paid tax in

(1) 21 Q. B. D. 52.

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addition thereto on a sum of £3000 received by him in respect of a remittance from Australia under the following circumstances.

Mr. Brooks is also a partner and has a large capital invested in the firm of Brooks, Robinson & Co., of Melbourne, Australia, who carry on the business of window-glass, oil and colour merchants, and storekeepers, at Melbourne. The two businesses are entirely distinct, and the said sum of £3000 represented the entire sum received by him during the financial year ending the 5th of April 1884.

The amount, however, standing to the credit of Mr. Brooks in the books of the firm of Brooks, Robinson & Co., as representing the estimated profits due to him for the year ending the 5th of April 1885, would, if realised, amount to £9219 in addition to the said sum of £3000.

This sum of £9219 was arrived at by an estimate and valuation on taking of stock on a certain fixed day after deducting therefrom the estimate and valuation of the preceding year, but as a matter of fact only a portion of the amount had been actually realised.

No portion of the sum of £9219 had been received in England or had at any time formed part of the income of this country.

On the above facts the Surveyor of Taxes contended that Mr. Brooks should be assessed, not only on the sum of £3000 remitted from Australia as aforesaid, but also on his estimate of profits of the firm of Brooks, Robinson & Co., of Melbourne, amounting to £9219 as aforesaid; and that he should make his return and be assessed under case 1, rules 1, 2, 3, and 4 to Schedule D to the Act 5 & 6 Vict. c. 35.

Mr. Brooks contended that those provisions did not apply to the assessment for income tax on such an interest as he had in the firm of Brooks, Robinson & Co., and applied only to cases where a trade was conducted, either in the United Kingdom or elsewhere, by the person assessed; and that the details of those rules, providing for the taking of an average of profits of trade, the various deductions to be allowed or disallowed in respect of repairs, depreciation of machinery, trade, plant, house rent, and interest of capital, &c., shew that the rules were inapplicable to his case. He contended that he was only liable to be assessed on

such sums as came home to him and were received in England, and that the income arising from his money interest in the firm of Brooks, Robinson & Co. was in the nature of income from securities; and that the income should be charged under the 4th case, or, in the alternative, under the 5th case of the 5 & 6 Vict. c. 35. Mr. Brooks further referred to 5 & 6 Vict. c. 35 s. 100 Sched. D, 4th and 5th cases, also ss. 39, 106, 108; 5 & 6 Vict. c. 80 s. 2; and 16 & 17 Vict. c. 34 ss. 5, 10; 24 & 25 Vict. c. 91, all of which provided for the assessment and payment of income from trade, at the place where such trade is carried on, but in cases where the income arises abroad, only on its arrival in Great Britain.

The Commissioners of Taxes were of opinion that the assessment should be confined to such sums as were from time to time received by Mr. Brooks in Great Britain, allowed the appeal accordingly, and reduced the assessment to £11,294.

The question for the opinion of the Court is whether Mr. Brooks is liable to be assessed on the said sum of £9219, or any part thereof? If the Court be of opinion that Mr. Brooks is liable to be assessed on the said sum, or any part thereof, the Commissioners' assessment is to be increased by such amount as the Court shall find; but if the Court shall be of opinion that he is not liable so to be assessed, the assessment is to stand confirmed.

The Queen's Bench Division (Stephen J., Wills J. dissenting) held Mr. Brooks liable to be assessed on the sum of £9219 (1). This decision was reversed by the Court of Appeal (Lord Esher M.R., and Lopes L.J., Fry L.J. dissenting), who held that Mr. Brooks was not liable (2).

The 16 & 17 Vict. c. 34 s. 2 Schedule D imposes income tax:—

"For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or

(1) 19 Q. B. D. 400. (2) 21 Q. B. D. 52.

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vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains:

"And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains:

"And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act, and to be charged for every twenty shillings of the annual amount thereof."

By 5 & 6 Vict. c. 35 s. 100 Schedule D:—

"Fifth case.—The duty to be charged in respect of possessions in Ireland, or in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain, and foreign possessions.

"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain, either for remittances from thence payable in Great Britain, or from property imported from thence into Great Britain, or from money or value received in Great Britain, and arising from property which shall not have been imported into Great Britain, or from money or value so received on credit or on account in respect of such remittances, property, money, or value brought, or to be brought, into Great Britain, computing the same on an average of the three preceding years, as directed in the first case, without other deduction or abatement than is hereinbefore allowed in such case."

May 16, 17; July 1, 4, 5. Sir *R. Webster* A.G. and Sir *E. Clarke* S.G. (*A. V. Dicey* with them) for the appellant:—

The principle of construction applicable to the statutory enactments in question is that cited by Fry L.J. from *Partington* v. *Attorney-General* (1). The plain words of 16 & 17 Vict. c. 34 s. 2

(1) Law Rep. 4 H. L. 100, 122.

must be interpreted according to their natural meaning. The respondent is admittedly a person residing in the United Kingdom. He carries on a trade elsewhere than in the United Kingdom, by which he makes profits and gains. How can it be said that they are not profits and gains "arising or accruing to" him? The respondent contends that those words mean no more than "received by." But where receipts are intended they are so called. Therefore "arising or accruing" means something more. The essence is residence; whether the person residing be a foreigner or an English subject. If the person resides he is chargeable in respect of his gross income however he may dispose of it. The argument in some of the judgments below that this is not British property is founded upon geographical considerations which are inapplicable to a statute which says "carried on elsewhere than in the United Kingdom." Suppose such a person banks with an Australian bank which has a branch in England: or suppose the profits made in Australia are remitted to him not in cash but in jewels or other goods? If the respondent is right such a person would not be liable. British nationality and the situation of the property or business have nothing to do with it. The test is residence: he who takes the benefit of that must take the fiscal liability. In dealing with these statutes the first thing is to read the charging sections, viz., the Income Tax Act of 1842, 5 & 6 Vict. c. 35 s. 100 Schedule D, with the cases and rules for computation; and the Act of 1853, 16 & 17 Vict. c. 34 s. 2, Schedule D. Sect. 39 of the Act of 1842 is not a charging section: it creates exemptions. The foreigner to bring himself within the exemption must prove that he is actually in the United Kingdom for a temporary purpose only, and that he has no intent to establish his residence therein, or that he has not actually resided therein for six months in the whole. For persons who are not ordinary residents a limited taxation is provided. But those limiting words are required in order to cut down the meaning of the charging words.

The exemptions must be confined to the cases for which they are specially provided and not extended by way of analogy. The exemption for a non-resident person is only with respect to profits or gains "received from foreign possessions," and does not

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extend to foreign trade. The words moreover are "received from," not "arising or accruing to." The exemption assumes that but for the words "received from" &c. "profits or gains arising or accruing to" would be taxable wherever received. The exemption has no bearing on the chargeability created by the earlier part of sect. 39. The present point was really determined in favour of the Crown in *Cesena Sulphur Co.* v. *Nicholson* and *Calcutta Jute Mills Co.* v. *Nicholson* (1); see also *Sulley* v. *Attorney-General* (2) and *Imperial Continental Gas Association* v. *Nicholson* (3).

For the meaning of "residence" in general see *R.* v. *Sargent* (4); *Whithorn* v. *Thomas* (5); and for its meaning under the Income Tax Acts see *Lloyd* v. *Inland Revenue* (6); *Attorney-General* v. *Coote* (7); *Young* v. *Solicitor of Inland Revenue* (8); *Rogers* v. *Inland Revenue* (9).

Sir *H. James* Q.C. and *Scrutton* for the respondent:—

First, the words of Schedule D of 16 & 17 Vict. c. 34 do not include such a case. The legislature cannot have intended the result contended for by the Crown in the case of foreigners: international comity and natural justice are against it. The short principle is this: tax profits whether made in the United Kingdom or received there.

Secondly besides the reasons given by the majority of the Court of Appeal there are insuperable difficulties in the way of the Crown. In working out the details it would be impossible to assess properly such profits as are sought to be charged. The elaborate machinery provided by the rules of 5 & 6 Vict. c. 35 is not adapted to such a case. These considerations become more apparent from a careful study of s. 39 of that Act (upon which the respondent lays great stress) and from the cases and rules contained in s. 100 Schedule D; especially the 3rd rule applicable to cases 1 and 2, and the fifth case; and from ss. 101, 106, 108, and 163–168. Who is to assess under s. 106? The com-

(1) 1 Ex. D. 428.
(2) 5 H. & N. 711.
(3) 37 L. T. (N.S.) 717.
(4) 5 T. R. 466.
(5) 7 Man. & G. 1.
(6) 21 Sc. Law Rep. 482.
(7) 4 Price, 183.
(8) 12 Sc. Law Rep. 602.
(9) 16 Sc. Law Rep. 682.

missioner of the parish or place where the trade is carried on. But there are none in Australia. How are questions of bad debts in Melbourne to be ascertained under case 1, rule 3? These profits fall under the exemption of the fifth case.

In *Cesena Sulphur Co.* v. *Nicholson* and *Calcutta Jute Mills Co.* v. *Nicholson* (1) only one subject-matter was discussed both in the argument and judgments: the principals were in England; the agency alone abroad: the profits abroad were dealt with by resolutions passed in England; the direction and management were in England and the profits were treated as having constructively flowed into England; and the point now in question was not really dealt with.

In interpreting statutes there is a presumption that the legislature did not intend to exceed its jurisdiction or interfere with the rights of foreigners: Maxwell on Statutes pp. 169–173; *Le Louis* (2); *The Annapolis* (3); *Ex parte Blain* (4); *Bulkeley* v. *Schutz* (5); *The Zollverein* (6); *Cope* v. *Doherty* (7); *Tuck* v. *Priester* (8); *Reg.* v. *Lewis* (9); *Rosseter* v. *Cahlmann* (10). In cases under the Legacy and Succession Duty Acts considerations such as these have limited the taxation: *Attorney-General* v. *Cockerell* (11); *Attorney-General* v. *Beatson* (12); *In re Bruce* (13); *Attorney-General* v. *Forbes* (14), also reported as *Attorney-General* v. *Jackson* (15); *Arnold* v. *Arnold* (16); *Thomson* v. *Advocate-General* (17); *Wallace* v. *Attorney-General* (18); *Attorney-General* v. *Campbell* (19). Domicil is not a universal test; only a rough working rule: *Chatfield* v. *Berchtoldt* (20).

Dicey in reply discussed all the topics above mentioned and referred to 5 & 6 Vict. c. 35 s. 52, and ss. 111–113.

The House took time for consideration.

(1) 1 Ex. D. 428.
(2) 2 Dod Adm. at p. 239.
(3) Lush. 295, 306.
(4) 12 Ch. D. 522.
(5) Law Rep. 3 P. C. 764.
(6) Swab. 96.
(7) 2 D. & J. 614.
(8) 19 Q. B. D. 629.
(9) 26 L. J. (M.C.) 104.
(10) 8 Ex. 361.
(11) 1 Price, 165.
(12) 7 Price, 560.
(13) 2 Cr. & J. 436, 451.
(14) 2 Cl. & F. 48.
(15) 8 Bli. (N.S.) 15.
(16) 2 My. & Cr. 256, 270.
(17) 12 Cl. & F. 1.
(18) Law Rep. 1 Ch. 1.
(19) Law Rep. 5 H. L. 524.
(20) Law Rep. 7 Ch. 192.

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Aug. 9. LORD HALSBURY L.C.:—

My Lords, I have had an opportunity of reading the judgment prepared by my noble and learned friend Lord Herschell. The question is a very difficult one, but I am of opinion that the conclusion at which he has arrived is the true conclusion; and therefore I am prepared to assent to the judgment which he is about to deliver.

LORD FITZGERALD:—

My Lords, the respondent in this case resides solely in England, where he is a partner in an English firm, and we may assume him to be a domiciled British subject. No question arises on his income out of his English business. He is also a partner in an Australian firm carrying on business at Melbourne, in which he has a large capital invested, and from which he has actually received in this country the sum of £3000 on account of profits for the financial year ending April 5 1884, and on that he has paid income tax.

The case stated further finds "the amount standing to the credit of Mr. Henry Brooks in the books of the Australian firm, as representing the estimated profits due to him for the year ending April 5 1885 would, if realized, amount to the sum of £9219 in addition to the said sum of £3000. This sum of £9219 was arrived at by an estimate and valuation on taking of stock on a certain fixed day, after deducting therefrom the estimate and valuation of the preceding year, but, as a matter of fact, only a portion of the amount had been actually realized. No portion of the sum of £9219 had been received in England, or had at any time formed part of the income of Mr. Brooks in this country."

At first sight it struck me very strongly that the respondent was chargeable here for income tax in respect of this sum of £9219, though not actually received in this country, but as being income arising out of trade carried on in Melbourne, his share of the profits having been actually ascertained and fixed and accruing to him in this sense, that it was so completely under his control that by an act of his will he could have it actually

transferred to his bankers here. There would be no hardship, and nothing dangerous or to be deprecated in charging the respondent on his share of profits so ascertained, but the facts of the case do not warrant our doing so. On looking critically at the findings in the case it will be perceived that there is no sufficient finding to warrant us in coming to the conclusion that the profits of the Australian firm have been so ascertained for the year 1885 as to be legitimately the subject of taxation here. It is only put that the profits due to him would *if realized* amount to £9219—a sum "arrived at by an estimate and valuation" on stock-taking on some particular day (not stated), and "deducting therefrom the estimate and valuation of the preceding year" (also made on a day not stated), "but as a matter of fact only a portion of the amount had been actually realized"—what the meaning of the word "realized" there is I do not know. The Australian firm does not appear to carry on any portion of their business in this country. The respondent does not appear to have taken or to take any active part in the conduct of its business, nor are its funds remitted to him save so far as they may represent his actual ascertained profits not required for the purposes of the business of the firm, and remitted to him in this country, so as to be at his disposal here as income. We are, therefore, remitted to and called on to decide whether the contention of the surveyor of taxes was right, that the respondent was liable to be assessed on this sum of £9219, though he had not actually received it, nor had it actually come within the United Kingdom.

The language of 16 & 17 Vict. c. 34 s. 2 Schedule D is so comprehensive that I doubt whether a net of language could be devised stronger and more apt to include the profits arising or accruing to the respondent from a business carried on elsewhere than in the United Kingdom, and must and ought to have full effect, unless we can infer from the other provisions of the particular Act or of the Code that it was not the intention of the legislature to tax income from trade carried on wholly and solely elsewhere than in the United Kingdom unless and until it has actually come to the United Kingdom as the income of some person residing in the United Kingdom.

My Lords, I have not only conferred with my noble and learned

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friends (Lord Herschell and Lord Macnaghten) on the construction of the Income Tax Acts in reference to this special and difficult question; I have had the great advantage also of reading and carefully considering an elaborate review of the Income Tax Acts which is about to be delivered by my noble and learned friend (Lord Macnaghten) who will follow me. I concur in the conclusion at which both my noble and learned friends have arrived.

There are no doubt insuperable difficulties in giving full effect to the universal language of the 2nd section of 16 & 17 Vict. c. 34 and Schedule D of that Act, and I am of opinion that the enactment must be controlled in the manner and to the extent which will be described by my noble and learned friends who are about to address the House, viz., that such profits derived from trade carried on entirely elsewhere than in the United Kingdom are not assessable for income tax until received *here* by the person entitled to them, being a resident in the United Kingdom.

LORD HERSCHELL:—

My Lords, this appeal arises upon a case stated by the Income Tax Commissioners. The respondent is a merchant residing in England, and carrying on business there, and in respect of the profits or gains of this business he was duly assessed and has paid the tax. He paid the tax in addition on a sum of £3000 received by him in respect of a remittance from Australia. This sum formed part of the profits of a business carried on at Melbourne, in which the respondent was a partner, and had a large capital invested. The estimated profits due to him for the year in question in respect of his share of the business amounted to £9219, in addition to the sum of £3000 already mentioned. The surveyor of taxes contended before the Commissioners that the respondent ought to be assessed not only upon the £3000 received in this country but upon his entire share of the profits which accrued during the year of assessment. The Commissioners rejected this contention, but stated a case for the opinion of the Court. Upon the argument of this case before two learned judges of the Queen's Bench Division they were divided in opinion, but the junior judge having withdrawn his judgment to

allow of an appeal, the Court of Appeal gave judgment in favour of the respondent, adopting the view of the Commissioners. The solution of the question raised by the case depends entirely upon the construction to be put upon the provisions of the Income Tax Acts. The claim of the Crown is based upon the terms of Schedule D, which impose the tax upon the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any trade whether carried on in the United Kingdom or elsewhere. The respondent does reside in the United Kingdom, profits did arise or accrue to him from a business carried on elsewhere than in the United Kingdom; therefore, say the learned counsel for the Crown, the case is within the very terms of the Act, and he must be held liable to assessment. I think it must be admitted that the words of the statute do primâ facie support this contention. For notwithstanding the ingenious criticism to which they have been subjected by the learned counsel for the respondent in their able argument, I think that giving to the language of the enactment its natural meaning the facts stated do apparently bring this case within it.

It is urged, however, on behalf of the respondent, that if this construction be adopted a foreigner residing for a short time only in this country would be subjected to taxation here in respect of the whole of his business earnings in his own country or elsewhere, that so to tax him would be opposed to international comity, and that a construction which would involve such a consequence cannot be correct. I think the learned counsel for the respondent are right in saying that the result which they point out would follow in the case of a foreigner, but I do not feel satisfied that it would involve a violation of international law, and that the construction contended for by the Crown ought on that ground to be summarily rejected. Reliance was placed upon the decisions under the Legacy and Succession Duty Acts, which have imposed a limit upon the broad language of the enactments subjecting legacies and successions to taxation. But it must be remembered that it was necessary to put some limit upon these general terms in order to bring the matters dealt with within our territorial jurisdiction; without such a limitation, the Legacy Duty Act, for example, would have been applicable,

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although neither the testator nor the legatee nor the property devised or bequeathed was within or had any relation to the British dominions. A construction leading to this result was obviously inadmissible. The Income Tax Acts, however, themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there. If the latter condition be fulfilled, I think it is competent for the legislature to determine the measure of taxation to be applied in the case of a person so resident. At the same time, I am far from denying that if it can be shewn that a particular interpretation of a taxing statute would operate unreasonably in the case of a foreigner sojourning in this country it would afford a reason for adopting some other interpretation if it were possible consistently with the ordinary canons of construction.

I think it cannot be denied that if the view put forward on the part of the Crown be correct, the incidence of the tax will be strangely anomalous. Schedule D imposes the tax upon the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever whether situate in the United Kingdom or elsewhere. This in terms would apply to all such profits and gains whether they found their way to this country or not. But by sect. 100 of 5 & 6 Vict. c. 35, the duties thus imposed are to be charged according to certain rules. One of these, styled the 4th case, relates to the duty to be charged in respect of interest arising from securities in the British plantations in America or in any other of Her Majesty's dominions outside Great Britain (for which may now be read the United Kingdom) and foreign securities. The duty to be charged in respect of these is directed to be computed on a sum not less than the full amount of the sums which have been or will be received in the United Kingdom in the current year. Another of these rules, styled the 5th case, prescribes the duty to be charged in respect of possessions in the British plantations of America or in any other of Her Majesty's dominions out of the United Kingdom and foreign possessions. The duty in respect of these is to be computed on a sum not less than the full amount of the actual sums annually received in the United Kingdom,

computing them on an average of the three preceding years. It is clear, therefore, that as regards income arising from investments or from possessions outside the United Kingdom the tax is only to fall upon so much of the income as is received in this country. I reserve what I have to say about the word "possessions," but I desire to point out that if the contention of the Crown be well founded, whilst the taxation of what I will term foreign income arising from the sources mentioned is limited to the amount which finds its way here, there is no such limit in the case of foreign income arising from a trade or profession or employment carried on abroad, the whole of which is subject to taxation, though no part of it ever reaches this country. No reason has been or can be suggested for so startling a difference. The distinction between the income from property such as a sugar plantation in the West Indies and from a business carried on there would often be a very fine one, and why a person interested in the latter should be burdened with taxation of which a person interested in the former is free was beyond the ingenuity of the learned counsel for the Crown to explain. Indeed, in this very case if the business in which the respondent is a partner were disposed of to a joint stock company, and he retained his interest in the form of shares in that company, though the annual return to him might be precisely the same, he would, I take it, be clearly free from the taxation it is now sought to impose. I am quite aware that there are inequalities in the incidence of the income tax and that the anomalies I have pointed out, glaring though they be, will not avail the respondent if the taxation be imposed by the clear language of the statute. But Lord Blackburn, who pointedly dwelt upon this in the case of *Coltness Iron Co.* v. *Black* (1), said: "The object of those framing a Taxing Act is to grant to Her Majesty a revenue; no doubt they would prefer if it were possible to raise that revenue equally from all, and as that cannot be done, to raise it from those on whom the tax falls with as little trouble and annoyance and as equally as can be contrived; and when any enactments for the purpose can bear two interpretations, it is reasonable to put that construction upon them which will produce these effects."

(1) 6 App. Cas. at p. 330.

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It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act. It is contended by the respondent that if we thus seek the aid to be derived from other provisions of the Income Tax Acts we shall be led to the conclusion that the view presented by the appellant is erroneous.

In the first place, it is said that although elaborate machinery is provided for carrying out the taxing purposes of the Act, none of it is applicable to the assessment of the profits of a trade carried on entirely outside the United Kingdom and no part of which is received here. If this be correct it certainly goes far to shew that the legislature cannot have intended to tax such profits. The 106th section of the Act provides first for the assessment of "every householder except persons engaged in any trade, manufacture, profession, or employment." It next deals with the case of "every person" so engaged, and enacts that he is to be chargeable by the Commissioners acting for the parish or place where such trade, manufacture, profession or employment is carried on or exercised wholly or in part in Great Britain. It next provides that every person, not being a householder nor engaged in any trade or profession, who shall have a place of ordinary residence, shall be charged by the Commissioners acting for the place where he shall ordinarily reside. Lastly, it deals with every person "not hereinbefore described." He is to be charged in the place where he resides at the time of beginning to execute the Act in each year. The counsel for the Crown argued that the respondent fell within this last category. But I think this argument cannot be sustained. He certainly is a person engaged in a trade within the earlier description, and therefore cannot be included in a class not thereinbefore described. And there is no other provision to be found in the statute which seems to apply to the case of profits derived from a trade carried on entirely outside the United Kingdom. The 108th section enacts that the duty to be assessed in respect of the profits or gains arising from

foreign possessions or foreign securities "or in the British plantations in America, or in any other of Her Majesty's dominions," may be assessed by the Commissioners acting for London, Bristol, Liverpool and Glasgow according to the regulations mentioned, "as if such duty had been assessed upon the profits or gains arising from trade or manufacture carried on in such places respectively." It further provides that the assessment is to be made by the Commissioners acting for such of the said places at or nearest to which the property shall have been first imported into Great Britain, or at or nearest to which the person who shall have received remittances or money arising from property not imported resides. I think that in this section, if anywhere, one would have expected to find a provision dealing with the profits of a business carried on outside the United Kingdom, the more so as the assessment referred to in the section is to be made by the Commissioners as if it had been upon the profits of "a trade or manufacture" carried on in London and the other places named. But it is admitted that this section is confined to property or money brought to this country; it affords no aid therefore to the present appellant, though I shall have to ask your Lordships to consider presently whether upon the true construction of the statute it does not cover the case with which we have to deal.

For the reasons I have given I think the respondent has successfully shewn that the Act has not provided the requisite machinery for assessing the duty on trade profits arising and remaining abroad, which is strong to shew that it was not intended to tax them. But the difficulty of the appellant does not end here. The Act prescribes certain rules for ascertaining the duties to be charged in respect of any trade, manufacture, adventure or concern in the nature of trade. One of these rules (1) provides that the computation of duty arising in respect of any trade carried on by two or more persons jointly shall be made and stated jointly and in one sum, and it designates the partner who is to make the return on behalf of himself and the other partner or partners, which is to be sufficient to charge the partners

(1) 5 & 6 Vict. c. 35, s. 100, Sch. D. rule 3 of Rules applying to both First and Second Cases.

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jointly. It further provides that no separate statement shall be made "in the case of any partnership" except for the purpose of the partners separately claiming an exemption or accounting for separate concerns, and that if no such claim is made then such assessment shall be made jointly, according to the amount of the profits and gains of the partnership. Now it is not pretended that the whole of the profits of the Australian firm are assessable. The shares of the Australian partners clearly cannot be taxed, yet where is there any provision for a separate statement and assessment such as the Crown contend for here? If the result of rejecting the argument presented on behalf of the Crown were to land your Lordships in the conclusion that profits arising from a business carried on abroad, even though received here, were not subject to the tax it would present a formidable obstacle to yielding to the argument of the respondent, though I am not sure that the difficulties you would have to encounter in refusing your assent to it would not even then be greater. But I do not think your Lordships are driven to this conclusion. The rule, styled the 5th case, which I have already referred to, deals with the duty to be charged in respect of possessions in any of Her Majesty's dominions out of Great Britain and foreign possessions. Now the word "possessions" is not used in the part of the Schedule D which describes the subjects of the tax. Speaking generally they are defined to be the profits arising from property and those arising from trades and professions. When therefore the term "possessions" is employed it seems to indicate an intention to cover by it something more than "property." And it is difficult to see why, unless the intention were to embrace something more, the latter word was not used. "Possessions" is a wide expression, it is not a word with any technical meaning; the Act supplies no interpretation of it. I cannot see why it may not fitly be interpreted as relating to all that is possessed in Her Majesty's dominions out of the United Kingdom or in foreign countries and which is a source of income. And if so I do not think any violence would be done to the language if it were held to include the interest which a person in this country possesses in a business carried on elsewhere. So to construe the Act would have the advantage of

removing the glaring anomaly to which I have referred as inevitably flowing from the rival construction and of taxing alike such portion only of the profits arising abroad whether from property or trade as is received in the United Kingdom.

The conclusion at which I have arrived is greatly fortified by a consideration of the 39th section of the Act, which provides that no person who shall actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who shall not actually have resided in Great Britain for six months in one year, shall be charged with the duties mentioned in Schedule D as a person residing in Great Britain in respect of the profits or gains received from or out of any possessions in any of Her Majesty's dominions, or any foreign possessions, or from securities in any of Her Majesty's dominions or foreign securities, but that every such person shall after such residence for such space of time be chargeable to such duties. The object of this enactment is plain. The Act contains no definition of the words "a person residing," and it was therefore apprehended that they might be held to embrace a foreigner sojourning in this country for a brief time and for a temporary purpose only. It accordingly exempts such a person from taxation; the duties are only to be chargeable after a residence of six months. But from what does it exempt him? Only from moneys received here from foreign or colonial possessions. If the construction we are asked by the appellant to put on the statute be correct, a foreigner temporarily sojourning here, for less than six months, though not liable to taxation even on the moneys transmitted to this country arising from his foreign possessions, is not exempted from liability in respect of the entire profits arising from a business carried on abroad, though not a penny of it be received here. That a foreigner in such circumstances should be bound to make a statement of these trade profits, and be assessed upon them, would be so unreasonable that I think a construction of the statute leading to such a result should be rejected unless no other be possible. It was indeed said by the appellant that a foreigner so situated would not be within the description of a person "residing" in this country. But if so there was no need

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for the exemption, which assumes that the person dealt with would otherwise be chargeable, and it would be difficult to resist the argument that, except so far as he was exempted, he was intended to be charged with the duties imposed by the Act. The whole section points, to my mind, strongly to the conclusion that moneys received in this country arising from possessions or securities outside its limits were supposed to be the only portion of what I have termed foreign income which was taxable.

I do not think it necessary to dwell on the case of the *Cesena Sulphur Company* v. *Nicholson* (1), on which much reliance was placed in support of this appeal. The head office, and therefore the principal place of business, of the companies whose income was under consideration was in England, and the argument turned principally upon where those companies resided. I need not stop to inquire whether the facts raised the same question as your Lordships have to determine. It is quite certain that the important considerations which have been pressed in argument upon this House were not present to the minds of the learned judges who took part in these decisions. And they cannot therefore be regarded as authorities determining the question.

I do not pretend to say that any construction of the Act is free from difficulty, or to deny that some anomalies may possibly result from that which I advise your Lordships to adopt, but it appears to me to be the one least open to objection, and which is most in accordance with the intention of the legislature, so far as I can gather it from the provisions of the Acts, taken as a whole. For these reasons I think the judgment appealed from ought to be affirmed.

LORD MACNAGHTEN:—

My Lords, this is a case of great importance and no little difficulty, but after the assistance afforded by the very able and elaborate arguments of counsel I cannot say that I have any doubt as to what the decision ought to be.

The case raises the question whether a person resident in the United Kingdom, and engaged in a trade carried on entirely

(1) 1 Ex. D. 428.

abroad, is liable to income tax in respect of all the profits of that trade, or only in respect of so much of those profits as may be brought to this country, either in kind or money. The trading in the present case was carried on at Melbourne, in Australia. The business was a partnership business; but I apprehend the question would have been the same if no one but the respondent had been interested in the concern.

Many topics which were discussed, and properly discussed, at considerable length during the argument may, I think, be laid aside. It does not appear to me that any light is thrown upon the question by considering the Legacy Duty Acts or the Succession Duty Act, or the decisions on those statutes. Nor do I think that any assistance can be gained by referring to one or two reported cases in which, perhaps, the question was involved or suggested, but where it did not receive much attention. Nor is there, I think, any room for the argument that the expression "arising or accruing to any person" in the first sentence of Schedule D means "received by any person in the United Kingdom." Moreover, although the contention on the part of the Crown, if carried to its legitimate conclusion, would certainly lead to startling results in the case of a foreigner temporarily resident in this kingdom, I do not think that even those results are so plainly at variance with what is due to the comity of nations as to compel your Lordships summarily to reject that contention without considering carefully what the legislature has actually said. And certainly, however unreasonable the consequences in other cases may be, there is nothing, I think, so very unreasonable in taxing a British subject who resides permanently in this country on the whole of his income, whether he chooses to bring it home or not.

It seems to me that the question must be determined on a consideration of the language of the Income Tax Acts, under which the claim is made, with such assistance as may properly be derived from a reference to Acts in pari materiâ. And I think that the question after all really lies in a narrow compass. Does the case fall within the "first case" of Schedule D in the Income Tax Act of 1842, and under the head of "Duties to be charged in respect of any trade, manufacture, adventure, or concern in

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the nature of trade, not contained in any other schedule of this Act"; or does it fall within the "fifth case," under the head of "The duty to be charged in respect of possessions in Ireland, or in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain, and foreign possessions"? Or, to put the question more shortly still, what is the meaning of the term "possessions" in the "fifth case" of Schedule D and in other places in the Act where it is used in the same connection?

In order to determine this question it is not, I think, immaterial to refer to the earlier Income Tax Acts from which the existing Acts are more or less copied.

The Income Tax Acts of 1806 and 1803, in regard to the question before your Lordships, differ so little, if they differ at all, from the Acts now in force that I may pass them by, and turn at once to the original Act, the Act of 1799, 39 Geo. 3, c. 13.

By that Act certain rates and duties therein specified were to be raised "throughout the kingdom of Great Britain upon all income arising from property in Great Britain belonging to any of His Majesty's subjects, although not resident in Great Britain; and upon all income of every person residing in Great Britain, and of every body politic or corporate, or company, fraternity, or society of persons (whether corporate or not corporate) in Great Britain, whether any such income as aforesaid shall arise from lands, tenements, or hereditaments, wheresoever the same shall be situate in Great Britain or elsewhere, or from any kind of personal property, or other property whatever, or from any profession, office, stipend, pension, employment, trade, or vocation."

Sect. 77 enacted, in order that the estimates of annual income chargeable by virtue of the Act might be made according to known rules, and with as much uniformity as the respective cases would admit, that in all cases the income chargeable by virtue of that Act should be estimated according to the rules and directions prescribed by that Act and the schedule thereunto annexed, as far as the same respectively were applicable to such income; and in all cases where the same were not applicable, then according to the best of the knowledge and belief of the person making the return.

Commissioners, to be styled commercial commissioners, "to ascertain the income of persons engaged in trade and manufacture" were to be appointed for certain districts, and it was enacted (sect. 102) that income from property in the American plantations, and imported into Great Britain, might be ascertained by the commercial commissioners for London, Bristol, Liverpool, and Glasgow in the same manner as if such income had arisen from trade or manufactures carried on in such places respectively, and (sect. 103) that income received in Great Britain arising from property of persons in such plantations not imported into Great Britain might be also ascertained in like manner.

The schedule to the Act, in accordance with which the income chargeable by virtue of the Act was to be estimated, contains a collection of "cases" and "rules" not differing much from the "cases" and "rules" in the schedules to the present Income Tax Acts. It is headed "Rules for estimating the income to arise within the current year of persons to be assessed under the Act of the 39th year of his present Majesty." These cases and rules are arranged under four divisions, which are as follows:—"I. Income arising from lands, tenements, and hereditaments. II. Income arising from personal property and from trades, professions, offices, pensions, stipends, employments, and vocations. III. Income arising out of Great Britain. IV. Income not falling under any of the foregoing rules."

Division III. is divided into two headings: "Seventeenth case. 1st. From foreign possessions," where "the full amount of the actual net income received in Great Britain" was to be estimated according to the year immediately preceding, or the average of the three preceding years. "Eighteenth case." "2nd. Money arising from foreign securities," where the annual income was to be estimated according to the produce of the preceding year, or the expected produce of the current year.

It cannot, I think, be doubted that "foreign securities" are a class of foreign possessions, and that "money arising from foreign securities" was included in a separate sub-division merely because the income chargeable was to be estimated on a slightly different basis. It is obvious that the subjects comprised in the

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two sub-divisions, whether the second is properly a separate sub-division or not, were meant to exhaust the whole category described in Division III. "income arising out of Great Britain." Now it can hardly be supposed that the framers of the Act could have overlooked the possibility that "income arising out of Great Britain" might include income arising from trade carried on abroad. Indeed, in the very case mentioned in sects. 102 and 103—the case of income arising from property in British plantations in America—the income in produce or money would certainly, for the most part, be income arising from concerns in the nature of trade; and those sections shew that that income was to be estimated in the manner in which "income from foreign possessions" was by the schedule directed to be estimated. I am therefore forced to the conclusion that in the expression "foreign possessions," as used in the Act of 1799, the word "possessions" is to be taken in the widest sense possible, as denoting everything that a person has as a source of income.

I now come to the Act of 1842, and I think it is only necessary to refer to a very few sections of that Act. For convenience sake, I will take the Act of 1842 as it stood before the passing of the Act of 1853, which substituted "the United Kingdom" for "Great Britain," and I will treat the case as if the Income Tax Acts had not been extended to Ireland.

The income of the respondent from his business in Melbourne, whether he is to be charged in accordance with the contention of the Attorney-General or not, undoubtedly comes under Schedule D. Undoubtedly, the portion of Schedule D which is contained in sect. 1 of the Act of 1842 is expressed in the most comprehensive terms possible; and, if not restrained or limited by what follows, would operate to charge the respondent in respect of the whole of his Melbourne income. I do not, however, agree with the argument urged at the Bar, that the rest of Schedule D, which is found in sect. 100, is mere machinery, or a mere collection of examples, not diminishing the generality of the earlier part of the schedule, but intended only to furnish a guide where the particular rule applies.

The whole schedule must be read together. Every case that can possibly happen under Schedule D is enumerated in sect. 100.

For every case which cannot be brought under one or other of the first "five cases" must fall under the "Sixth case." Unquestionably the rules applicable to a particular "case" may cut down, and cut down very materially, the charging words in the earlier part of Schedule D. For instance, it cannot I suppose be denied that foreign securities are a "kind of property situate elsewhere than in Great Britain." By the earlier part of Schedule D the rates and duties chargeable in respect thereof would be so much for every 20*s.* of the annual profits or gains arising or accruing therefrom. But the rules under the "fourth case" limit the charge to the amount received in Great Britain.

It seems to me that the profits or gains from the respondent's Melbourne business might be held to fall either under the "first case" or under the "fifth case," if one looked to nothing more than the language of those two "cases." The "first case" deals with "duties to be charged in respect of any trade . . . not contained in any other schedule." In its terms no doubt that would include the respondent's business at Melbourne as well as his business in London. The second rule of the "first case" declares that "the said duty shall extend to every person, body politic or corporate . . . or society and to every . . . concern carried on by them respectively in Great Britain or elsewhere except such concerns as are mentioned in Schedule A." Again in its terms this rule points to a business carried on out of Great Britain as well as to one carried on in Great Britain. But then when one tries to apply the rules and provisions of the Act relating to profits and gains from trades to a trade carried on exclusively abroad one gets into hopeless difficulties. If it is a partnership business, as this is, the return is to be made by the senior partner resident in Great Britain. But then the partner is to make he return "on behalf of himself and the other partner or partn rs," and his return is "sufficient authority to charge such part ers jointly" and "no separate statement" is to be allowed in any case of partnership except for "the purpose of the partners separately claiming an exemption" or "of accounting for separate concerns."

Then, again, the computation of the duty to be charged in respect of any concern in the nature of trade is to be made

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exclusive of the profits or gains arising from lands occupied for the purpose of such concern. That rule hardly seems applicable to a foreign mine or a sugar plantation in the West Indies.

Then, again, by sect. 106, every person engaged in any trade is to be chargeable by the commissioners acting for the parish or place where the trade is carried on, whether such trade is exercised wholly or in part only in Great Britain. And there are other provisions which it is not necessary to go through which seem to shew that the "first case," though clearly applying to a trade carried on partly abroad and partly in Great Britain, was not intended to apply to a trade carried on exclusively abroad.

Turning now to the "fifth case," I ask, why are not the respondents' profits and gains from his Melbourne business within the "fifth case"? What is the meaning of the term "possessions" in that "case"? The word "possessions" is not a technical word. It seems to me that it is the widest and most comprehensive word that could be used. Why, for instance, should not "possessions in Ireland" mean everything, every source of income that the person chargeable has in Ireland, whatever it may be? Why should not "profits from possessions out of Great Britain," which is to be found in Schedule G., No. XI., and recalls the expression "income out of Great Britain" in the Act of 1799, mean profits from every source of income abroad? I use the expression "source of income," because it is as a source of income that the Act contemplates and deals with property, and everything else that a person chargeable under the Act may have, and the Act itself, in sect. 52, uses the expressions "sources chargeable under the Act" and "all the sources contained in the said several schedules" as describing everything in respect of which the tax is imposed.

There are two sections in the Act to which I will refer, as showing that the word "possessions" must have this meaning.

Take the 39th section. Under that section an Irishman who happened to be in Great Britain for some temporary purpose only, and not with any intent of establishing his residence there, and whose actual residence in Great Britain did not amount to a period of six months in any one year, was "not to be charged with the said duties mentioned in Schedule D as a person residing

in Great Britain in respect of the profits or gains received from or out of any possessions in Ireland," or "from securities in Ireland." He was not even to be charged in respect of his receipts in Great Britain from those sources. It could not be suggested that as a temporary resident for less than six months he was to be charged in respect of any gains or profits from an Irish source which were not received in Great Britain. But then the section goes on to say that after six months' residence "such person is to be chargeable to the said duties," that is to the duties "in respect of the profits or gains received from or out of any possessions in Ireland" or "from securities in Ireland." Now if profits and gains from an Irish business be not included in profits and gains from possessions in Ireland, it is certainly very singular that no mention of them is to be found in sect. 39. It cannot be supposed that the presence in England of an Irishman engaged in business in Ireland was so rare a thing that it escaped the attention of the framers of the Act. Nor can it, I think, be supposed that a person made liable as a temporary resident in Great Britain by reason of six months' residence there was intended to escape altogether from the payment of income tax upon receipts from his Irish business. Yet what would there be to charge him if the appellant is right? The only way to give a rational meaning to sect. 39 is to construe the expression "possessions in Ireland" as including every source of Irish income (other than Irish securities which are separately mentioned) belonging to the person chargeable.

Sect. 106 seems to me to point in the same direction. It explains in what districts the duties contained in Schedule D are to be charged. After dealing minutely with the case of persons carrying on business either wholly or partly in Great Britain, it provides for the duty to be assessed in respect of the profits or gains arising from possessions or securities in Ireland, and there again there is no mention of profits or gains arising from trade or business in Ireland, and no provision for the place where such profits or gains are to be assessed unless they are to be taken to be included in the expression "possessions in Ireland." If not so included, the omission to mention them in that section is the more extraordinary, because the greater part

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of the section is occupied with the subject of profits and gains from trade.

It is obvious, too, I think, that if the expression "possessions in Ireland" be given a narrower meaning than that which I have suggested as its proper meaning, endless difficulties and anomalies would arise. However much you narrow the meaning of the word "possessions," you cannot narrow it so far as to exclude all trades or concerns in the nature of trade.

Even in the rule applicable to the "fifth case," there is, I think, an indication that the case covers profits from foreign trades. It will be observed that the only deduction or abatement allowed is that allowed in the "first case." On referring to the "first case" it will be found that that deduction or abatement is one applicable, and only applicable, I think, to the case of a trade.

Upon the whole therefore I have come to the conclusion that the profits and gains arising from the respondents' Melbourne business fall under the "fifth case" of Schedule D, and are chargeable accordingly on the actual sums received in the United Kingdom. And consequently I am opinion that the appeal ought to be dismissed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals 9th August 1889.

Solicitor for appellant: *Sir W. H. Melvill, Solicitor of Inland Revenue.*

Solicitors for respondent: *Shepheards.*

[HOUSE OF LORDS.]

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THE OWNERS OF THE STEAMSHIP "GRACIE" . . . . . } APPELLANTS;

AND

THE OWNERS OF THE STEAMSHIP "ARGENTINO" . . . . . } RESPONDENTS.

"THE ARGENTINO."

Collision—Damages, Measure of—Loss of Profits—Agreement to provide Vessel for particular Voyage—Restitutio in Integrum—Remoteness of Damage.

A collision occurred between two vessels, the *A.* and the *G.*, shortly after a contract had been made by the owners of the *A.* that upon the completion of her then voyage she should proceed upon another voyage. The repairs to the *A.* made necessary by the collision could not be completed in time to enable her to fulfil the contract. In an action by the owners of the *A.* against the owners of the *G.* the former claimed damages in respect of the loss of the earnings which would have been derived from the employment contracted for:—

Held, affirming the decision of the Court of Appeal (13 P. D. 191), that the damages claimed were not too remote but flowed directly and naturally from the collision, and that such damages should be allowed as would represent the loss of ordinary and fair earnings of such a ship as the *A.*, having regard to the fact that the contract had been entered into.

APPEAL from a decision of the Court of Appeal (1) varying a direction of Sir James Hannen (2).

A collision took place in the Thames between the steamships *Argentino* and *Gracie* on the 20th of February 1887. It was agreed that both ships were to blame, and the only question on this appeal was as to the measure of damages recoverable by the *Argentino* from the *Gracie* under the circumstances stated in the judgment of Lord Herschell.

July 26, 29. *Finlay* Q.C. and *A. E. Nelson* for the appellants:—

The first objection to the order appealed against is that the loss of profit allowed is not a subject of damage at all. In a collision case the damages are limited to the cost of repairs and demurrage, or compensation for loss of time during disablement.

(1) 13 P. D. 191. (2) 13 P. D. 61.

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This is so whether the injury be to a man or a machine: and there is no difference between the rule at common law and in the Admiralty. To extend the limit in the way suggested is to go into mere speculation. A vessel loses one voyage: but the effect of the detention may be to give her a more profitable charter. In such a case the loss of the contemplated voyage is actually for the benefit of the ship. It could not be contended that such a profit could be set off against the cost of repairs. Then why should a loss upon the balance of the contemplated and the actual voyages be allowed to swell the damages? The only logical principle is to exclude such considerations altogether as too speculative and remote. There is nothing in the present case to shew that the *Argentino* was worse off in the events which happened. Further, the directions to the registrar are erroneous in that they give the same subject of damage twice over; in the form of loss of profit of the particular voyage, and as demurrage: Nos. 16 and 17 of the items being both taken into consideration. Again, from whatever damages are given under the head of lost earnings there should be deducted whatever the vessel earned or might have earned otherwise.

[They discussed at length the following cases: *Phillips* v. *London and South-Western Ry. Co.* (1); *In re Trent and Humber Co.* (2); *The Betsey Caines* (3); *The Yorkshireman* (4); *The Gazelle* (5); *The Columbus* (6); *The Clarence* (7); *The Inflexible* (8); *The Black Prince* (9); *The Star of India* (10); *The Parana* (11); *The Gleaner* (12); *The Consett* (13); *The Risoluto* (14); *The Notting Hill* (15); and the following American cases: *The Steamboat Naragansett* (16); *The Stromless* (17); *Smith* v. *Condry* (18). Lord Herschell referred to *Fletcher* v. *Tayleur* (19).]

(1) 5 C. P. D. 280.
(2) Law Rep. 4 Ch. 112.
(3) 2 Hagg. Adm. 28.
(4) Ibid. p. 30, n.
(5) 2 Wm. Rob. Adm. 279.
(6) 3 Wm. Rob. Adm. 158, 162.
(7) Ibid. 283.
(8) Swab. 200, 204.
(9) Lush. 568.
(10) 1 P. D. 466.
(11) 2 P. D. 118.
(12) 38 L. T. (N.S.) 650.
(13) 5 P. D. 229.
(14) 8 P. D. 109.
(15) 9 P. D. 105.
(16) Olcott, Adm. 388.
(17) 1 Lowell, Judgments, Mass. Dist. 153.
(18) 1 Howard, Supr. Court, 28, 34, 35.
(19) 17 C. B. 21.

Sir *Walter Phillimore* and *H. F. Boyd* for the respondents:—

Demurrage, of course, cannot be given as well as loss of profit: but in lieu of ordinary demurrage rates compensation is claimed for loss of what would have been earned if there had been no collision. The measure of damage is the value of the profitable voyage lost, less the amount actually earned. The cases cited by the appellants prior to *The Star of India* (1) form a chain of decisions in favour of the respondents, and *The Star of India* (1) is exactly like the present case.

[They also referred to *Bodley* v. *Reynolds* (2); *Wood* v. *Bell* (3); and *France* v. *Gaudett* (4).]

Nelson replied.

The House took time for consideration.

Aug. 9. LORD HERSCHELL:—

My Lords, the steamships *Argentino* and *Gracie* having been both declared to blame in cross actions for damages sustained by a collision between the two vessels, the damages were referred in the usual way to the registrar and merchants. The claim sent in by the *Argentino* contained the following items: "16. Loss of profit on succeeding voyage, which had been contracted for, but which the defendants were unable to carry out, and for which another steamer was substituted, including eight days' time lost in loading cargo upon next voyage beyond the time which would have been consumed in loading the cargo originally contracted for, £785 16*s.* 5*d.* 17. Demurrage of the S.S. *Argentino* 1427 tons gross, for nineteen days, at 5*d.* per ton per day £564 17*s.* 1*d.*" The registrar disallowed the item 16 altogether, and allowed £232 in respect of item 17. The learned President of the Admiralty Division referred the case back to the registrar to ascertain the amount of loss which the owners of the *Argentino* had sustained by that vessel not being able to fulfil an engagement entered into prior to the collision. His decision

(1) 1 P. D. 466.
(2) 8 Q. B. 779.
(3) 5 E. & B. 772.
(4) Law Rep. 6 Q. B. 199.

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was affirmed by the majority of the Court of Appeal, with a variation in the direction given to the registrar (1).

The facts are not in dispute. The collision took place in the Thames on the 20th of February 1887. Ten days prior to the collision, whilst the *Argentino* was at sea on a voyage from Sebastopol, it was arranged between Messrs. Westcott & Lawrence, shipbrokers, who collect cargo at London and Antwerp for conveyance to the Black Sea, and the managing owner of the *Argentino*, that as soon as that vessel had arrived and discharged her cargo she should proceed to Antwerp and load for the Batoum route. In consequence of the collision the *Argentino* could not keep her engagement, and Westcott & Lawrence had to procure another vessel. Immediately after the repairs of the *Argentino* were completed, she left for Antwerp, having been engaged some days before that date to proceed to Odessa viâ Antwerp and London.

The question raised by this appeal is whether the damages claimed by the *Argentino* in respect of the loss of the earnings which would have been derived from the employment of the vessel which had been arranged for prior to the collision are in point of law recoverable. It is admitted that there is no special rule of the Admiralty Court governing the question, and that the law there administered in relation to such a matter is the same as prevails at common law. Your Lordships have therefore to consider whether, if this were an action brought in the Courts of Common Law and tried by a jury, the judge ought to have directed the jury that these damages could not be recovered on the ground that they were too remote. That damage, though undoubtedly traceable to the wrong in respect of which the action is brought, may, nevertheless, be too remote, and therefore not

(1) Sir James Hannen, by his order of the 14th of February, 1888, "referred back the report to the registrar and merchants for further consideration as regards item No. 16.'

The Court of Appeal, by their order of the 9th of August, 1888, "referred back the report to the registrar, assisted by merchants, for further consideration, with directions that such damages should be allowed in respect of this collision as would represent the loss of ordinary and fair earnings of such a ship as the *Argentino*, having regard to the fact that she was for the time on Westcott's line of steamers, trading to Alexandria and to the Black Sea, and advertised to sail as such."

recoverable, is beyond dispute. I do not think there has been much difference of opinion as to what constitutes remoteness of damage. The definitions which have been given, though varying in their mode of expression, appear to me to be substantially the same. They have generally taken a negative form, indicating what damage is not regarded as too remote, and leaving all else as properly falling within that description.

I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. But, further than this, I agree with the Court below that the damage is not necessarily limited to the money which could have been earned during the time the vessel was actually under repair. It does not appear to me to be out of the ordinary course of things that a steamship, whilst prosecuting her voyage, should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequence of the collision. I observe that no mention was made in the judgments of the learned judges in the Courts below of the claim for demurrage and the allowance of the registrar in respect of it. The matter was pointedly brought before your Lordships in the arguments at the bar on behalf of the appellants, and it was urged that if the judgment of the Court below were affirmed the respondents would get the damages twice over. I think it right, therefore, to state how this matter ought in my opinion to be dealt with.

Where no claim is made in respect of loss arising from the owner having been deprived of the earnings of a voyage which was in contemplation, and the engagement for which had been secured, it would be right, and is no doubt the usual course, to award damages under the name of demurrage in respect of the loss of earnings which it must reasonably have been anticipated

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would ensue during the time of detention. But where such a claim is made as in the present case, the owner cannot, I think, be allowed in addition, as a separate item, demurrage in respect of the time the vessel was under repair. If he obtains as damages the loss which he has sustained owing to the loss of the employment he had secured he is put in the same position as if there had been no detention.

There would of course have to be taken into account, however, that if the shipowner lost the contemplated voyage, he had the use of the vessel as soon as the repairs were completed for any other purpose, and what he earned, or rather what he could have earned upon any other adventure during the time he would otherwise have been engaged upon the contemplated voyage, must be set against the sum allowed him in respect of the loss of that voyage. It must be borne in mind of course that the set-off or deduction ought only to be in respect of what might have been earned in that part of the time covered by the lost voyage during which the owner had the use of his ship. It is, I think, only in this way that in a case like the present the length of time during which the ship was laid up for repairs can be taken into account. It is one of the circumstances to be considered in assessing the damages.

For the reasons I have given I think the judgment of the Court of Appeal should be affirmed.

LORD FITZGERALD :—

My Lords, in this case I concur in all that my noble and learned friend has just stated, and in the result at which he has arrived.

It is to be regarded in the light of a common law action brought by the owners of the *Argentino* against the vessel in collision; and upon the main question as to whether the damages resulting to the owners of the *Argentino* from that collision were too remote or not, I never from the beginning entertained any doubt. It is not alone that they are not remote, but they are the proximate result of the collision. I therefore adopt entirely the joint judgment of Bowen L.J. and Lindley L.J. in the Court of Appeal.

LORD MACNAGHTEN:—

My Lords, I concur.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 9th August 1889.

Solicitors for appellants: *Lowless & Co.*

Solicitors for respondents: *Downing, Holman & Co.*

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BIRCH . . . . . APPELLANT;

AND

CROPPER AND OTHERS . . . . . RESPONDENTS.

In re THE BRIDGEWATER NAVIGATION COMPANY LIMITED.

Company—Capital partly paid up—Preference Shareholders—Winding up—Surplus Assets—Distribution according to Subscribed Capital—Companies Act 1862 (25 & 26 *Vict. c.* 89) *s.* 133 *sub-s.* 1, 10.

The articles of association of a limited company incorporated under the Companies Act 1862 provided that the net profits of each year should be divided pro ratâ upon the whole paid-up share capital and that the directors might declare a dividend thereout on the shares in proportion to the amounts paid up thereon. The articles contained no provisions as to the distribution of assets on the winding-up of the company. The original capital consisted of ordinary shares, partly paid up. Afterwards preference shares were issued entitling the holders to a dividend at a fixed rate with priority over all dividends and claims of the ordinary shareholders. The preference shares were fully paid up. The undertaking having been sold under an Act which made no provision for the distribution of the purchase-money among the shareholders, the company was voluntarily wound up and assets remained for distribution:—

Held, reversing the decision of the Court of Appeal and varying the order of North J. (39 Ch. D. 1), that in distributing the assets "amongst the members according to their rights and interests in the company," and in adjusting "the rights of the contributories amongst themselves" (under 25 & 26 Vict. c. 89 s. 133 sub-ss. 1, 10), the liability of the ordinary shareholders for the unpaid balance of their shares must not be disregarded;

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and that after discharging all debts and liabilities and repaying to the ordinary and preference shareholders the capital paid on their shares, the assets ought to be divided among all the shareholders, not in proportion to the amounts paid on the shares, but in proportion to the shares held.

APPEAL from a decision of the Court of Appeal (1).

The question was on what principle a balance of about £550,000 after satisfying all liabilities was to be distributed among the preference and the ordinary shareholders respectively of the Bridgewater Navigation Company in the voluntary winding-up of that company. The facts are stated at length in the report of the decisions below (1), and are summarised in the judgments of Lords Herschell and Macnaghten in this House.

The order of North J. declared that the balance of the proceeds of sale of the undertakings to the Manchester Ship Canal Company remaining after satisfaction of all the debts and liabilities of the Bridgewater Navigation Company, Limited, and after adjusting the rights of the shareholders inter se (other than their rights in respect of the purchase-money), and after payment of the costs of the liquidation and repayment to the shareholders (both ordinary and preference) of the capital respectively paid on their shares, ought to be divided among the holders of all the shares of the Bridgewater Navigation Company, Limited, in proportion to the amounts respectively paid up on their shares.

This order was affirmed by the Court of Appeal (Cotton, Fry and Lopes L.JJ (1)).

July 23, 25. Sir *Horace Davey* Q.C. and *Cozens-Hardy* Q.C. (*O. L. Clare* with them) for the appellant who represented the holders of ordinary shares:—

The company being wound up voluntarily under the Companies Act 1862 (25 & 26 Vict. c. 89) the balance of the assets now in question must be in the words of sect. 133 sub-sect. 1: "distributed amongst the members according to their rights and interests in the company;" and by sub-sect. 10: "the liquidators shall pay the debts of the company and adjust the rights of the contributories amongst themselves." What are their rights and interests? Substantially they are the same as under a compul-

(1) 39 Ch. D. 1.

sory winding-up under sect. 109. Three modes of distribution suggest themselves. First, repay the preference shareholders their capital and divide the rest among the ordinary shareholders. By the terms of their creation the preference shareholders are entitled to receive 5 per cent. on their capital as long as the company is a going concern and is earning profits, and nothing more. They are in fact in the same position as debenture-holders. They are not entitled to any share of profits when the company is wound up, and the assets now in question are profits, just as much so as when the company is going. While their capital is in the business their agreement is to receive 5 per cent.: when the business is wound up the ordinary shareholders are in the position of residuary legatees. This would be so in an ordinary partnership, and a company is only a statutory partnership. "In the absence of special agreement the rise or fall in value of fixed plant or real estate belonging to a partnership is as much profit or loss of the partnership as anything else": *Robinson* v. *Ashton* (1) per Jessel M.R.; *Watney* v. *Wells* (2); *Binney* v. *Mutrie* (3); Lindley on Partnership 5th ed. p. 402. "When the partnership comes to an end the right to the share of profits comes to an end also; and you distribute the assets, after providing for the profits earned up to the time of the dissolution, in proportion to the partners' shares of the partnership capital. That is the general rule of law in a commercial partnership:" *Griffith* v. *Paget* (4) per Jessel M.R.

Secondly, the preference shareholders might receive the capital value of a perpetual annuity of 5 per cent. upon the amounts of their paid-up capital.

Thirdly, the distribution may be, and (if the other modes are rejected) should be, among the shareholders according to their shares in the subscribed capital, without reference to the amount paid up: *Oakbank Oil Co.* v. *Crum* (5); *Ex parte Maude* (6). The decision of the Court of Appeal is entirely devoid of principle; it takes no account of the liability of the ordinary shareholders upon the unpaid part of their shares. But this cannot be disregarded,

(1) Law Rep. 20 Eq. 25, 28.
(2) Law Rep. 2 Ch. 250.
(3) 12 App. Cas. 160.
(4) 6 Ch. D. 511, 515.
(5) 8 App. Cas. 65.
(6) Law Rep. 6 Ch. 51.

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and it is conclusive against the decision of that Court. Their Lordships thought they were bound by the decision of the Court of Appeal in *Sheppard* v. *Scinde, Punjaub and Delhi Ry. Co.* (not reported except in 36 W. R. 1), but that case is no authority for any other case which is not precisely similar in all its facts. It turned entirely on the special terms of a deed of arrangement, and all the noble and learned Lords who took part in the decision in this House (Lord Halsbury L.C. and Lords Watson, Bramwell, FitzGerald, and Macnaghten, March 4, 1889) based their judgments upon the special circumstances, and were of opinion that no assistance was to be derived from reported decisions or from the consideration of principles relating to the law of partnership or of rules applicable to the liquidation of joint stock companies.

Rigby Q.C. and *Buckley* Q.C (*Swinfen Eady* with them) for the respondent Schofield, who represented the holders of preference shares:—

The point now in question has never been expressly decided. It has been raised thrice; in *Somes* v. *Currie* (1); in *Sheppard* v. *Scinde, Punjaub and Delhi Ry. Co.* (2); and in the present case. It is quite clear that the preference shareholder is not in the same position as a debenture-holder, for the former has an interest in losses: the latter has not. The possibility of liability on the unpaid part of the ordinary shares ought not to have the effect contended for. The profits and the balance of assets now divisible were earned by the paid-up capital, not by the unpaid, which had no concern in the matter. Why should the unpaid capital have any value attributed to it? It is impossible to say how much (if any) should be. The true principle is, distribution according to contribution: *In re Exchange Drapery Co.* (3); Lindley on Company Law, 5th ed. p. 455. The balance-sheets and history of the company shew conclusively that the money raised by these preference shares went to pay off or reduce loans, and therefore to pay for the land and other assets of the company, and thereby helped to earn profits and to create the assets

(1) 1 K. & J. 605. (2) 36 W. R. 1.
(3) 38 Ch. D. 171.

now divisible. The decision of the Court of Appeal is right, and for the reasons there given.

S. A. Sampson for the liquidators, respondents, took no part in the argument.

Sir *H. Davey* Q.C. replied.

The House took time for consideration.

Aug. 9. LORD HERSCHELL:—

My Lords, the only question for determination in this case is upon what principle the balance of the proceeds of the realization of the assets of the Bridgewater Navigation Company remaining after satisfying all the liabilities of the company and returning to the shareholders the paid-up capital, is to be distributed as between the holders of the ordinary and preference shares of the company. The company was formed in 1872 for the purpose of acquiring the Bridgewater and other canals, with a capital of £500,000 divided into 500 shares of £1000 each. By resolution duly passed in September of that year, it was provided that the capital instead of being divided into shares of £1000 should be divided into 50,000 shares of £10 each, and should be increased to £1,300,000 consisting of 130,000 shares of that amount.

Prior to April 1880, 100,000 shares out of the capital of £1,300,000 had been issued as ordinary shares, upon which £2 10*s.* per share had then been paid; and on the 27th of that month it was resolved at an extraordinary meeting that the balance of the uncreated capital, viz. £300,000, should be created, and that the 30,000 new shares should be issued as preference shares entitling the holder to a preferential dividend of 5 per cent. In pursuance of this resolution the shares were issued accordingly, and the additional capital of £300,000 was paid up. At the same time a call of £1 was made on the ordinary shares, raising the amount paid up on them to £3 10*s.* per share.

In 1887 the Manchester Ship Canal Company purchased the undertaking and assets of the Bridgewater Canal Navigation Company for the sum of £1,710,000, and it was thereupon

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resolved that the latter company should be wound up voluntarily. In the September following the liquidators repaid to the preference and ordinary shareholders the amount of capital paid up on their shares. After making this return to the shareholders, and after discharging all the debts and liabilities of the company there remained in the hands of the liquidators a surplus of about £550,000. The question is how this surplus ought to be distributed amongst the ordinary and preference shareholders respectively?

The Court below has determined that the distribution ought to be made in proportion to the amounts respectively paid up on their shares, and your Lordships have to determine whether this is the correct principle to apply. It is contended on behalf of the appellant, who represents the ordinary shareholders, that they are entitled to the whole of the surplus; but failing this contention, it is insisted that the division ought to be made according to the capital subscribed and not to the amount paid up on the shares.

The Companies Act affords very little assistance in terms towards a decision of the question. It provides that in the case of a voluntary winding-up the property of the company shall be applied in satisfaction of its liabilities, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company. But this leaves undetermined what those rights and interests are.

The learned counsel for the appellant argue that except in so far as the provisions of the Companies Acts necessarily create a distinction between the rights of its members and those of partners, the principles of the law of partnership are applicable and ought to be applied: and they urge that in the case of a partnership, unless the terms upon which it is entered into provide otherwise, surplus assets are distributable amongst the partners in the proportions in which they are entitled to share the profits. Even assuming that the doctrine laid down with regard to the division of surplus assets, in the case of a partnership, be correct (upon which I pronounce no opinion), I am unable to see how it establishes the appellant's claim, that the ordinary

shareholders should receive the whole of the assets. The appellant's argument appears to assume that the preference shareholders are not entitled to any share of the profits of the company. I do not think this is the case. What they are to receive is indeed limited in its amount, but it is none the less a share in the profits. To treat them as partners receiving only interest on their capital and not entitled to participate in the profits of the concern, or to regard them as mere creditors whose only claim is discharged when they have received back their loan, appears to me out of the question. They are members of the company, and as much shareholders in it as the ordinary shareholders are; and it is in respect of their thus holding shares that they receive a part of the profits. I think therefore that the first contention of the appellant wholly fails.

The other point raised by the appeal is to my mind one of considerable difficulty. There is no decision bearing directly upon the point, and it must therefore be determined upon general principles of equity. Some stress was laid in the Court below upon the decision in the case of *Sheppard* v. *Scinde, Punjaub and Delhi Railway Company* (1); but I do not think that case can be relied on as an authority except where the circumstances are precisely similar. All the noble and learned Lords who took part in the consideration of that case in this House rested their opinions upon the very special facts of the case, and intimated that they were not laying down any general principle.

The view taken by the Court below has presented to my mind from the outset some formidable difficulties. I cannot but feel that it would in some cases be most inequitable to take into consideration in distributing the surplus assets only the amount of capital paid up by the several classes of shareholders, and to make the distribution accordingly. In the Court of Appeal Cotton and Fry L.JJ. were guided to their conclusion by the provisions contained in the articles of association of this particular company. With all deference I do not think that they really afford the assistance that was supposed. The 85th article of association prescribes that the net profits of each year shall be divided pro ratâ upon the whole paid-up capital of the

(1) 36 W. R. 1.

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company and that the directors may declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon. But this article is clearly inapplicable to the preference shareholders who do not share pro ratâ in the profits of the year. Their rights are determined by the resolution creating the new capital which provided that the new shares were to entitle the holders thereof to a dividend of 5 per cent. per annum "upon the amount for the time being called up thereon," and taking precedence over all dividends on the ordinary shares. This clearly, by implication, excludes in the case of these shares the operation of article 85. Cotton L.J., after pointing out, I think correctly, that under the articles, both as regards the ordinary shareholders and the preference shareholders respectively, inter se, the right to the dividend was to be on the footing of its being in proportion to the sum paid up on the shares, proceeds to say: "That is the footing on which to decide it. All question of preference is now at an end, and the shareholders are to be dealt with as having equal rights, because the provision in the articles creating the preference shares as regards dividend to arise on the working of the capital is at an end. We must deal with them all as shareholders having equal rights without reference to profits, and, in my opinion, when that is so, and when there is the indication in the articles of association which form the contract of partnership that profit is to be divided when it is a going concern and arising from the working of the business in accordance with the sums paid upon each share, then in this particular case, and having regard to that provision, the true equitable mode of dividing this sum is to divide it among all the shareholders in accordance with and in proportion to the amount paid up by them on their shares." I have a difficulty in seeing how the provisions of the articles alluded to show that the equitable mode of distribution is that suggested. It is conceded that they cease to be applicable when the company comes to be wound up, but if they are to be regarded at all, I think that their full effect must be borne in mind. It is not the case that when the company was a going concern the profits earned were to be divided in accordance with the sums paid on each share. The share of the profits to which the

preference shareholders were entitled was limited in amount. It did not depend upon the proportion which the profits bore to the total paid-up capital. And the ordinary shareholders were in fact receiving a proportion of the profits exceeding that to which they would have been entitled had such profits been divided to each shareholder in proportion to the capital paid up. I do not say that this indicates the mode in which the surplus assets should be distributed, but it does appear to me to shew that it does not follow from the method in which profits were divided that the equitable mode of dividing surplus is to let all the members share alike in proportion to the amount paid up on their shares. In the present case, too, it cannot be doubted that in estimating the price to be paid by the canal company the future prospects of the Bridgewater Company, the probable development of its property and the increase in its value were taken into account. In these future prospects the preference shareholders had no concern save in so far as they improved the security for the payment of their interest. If that security was already ample the benefit arising from the increased value of the company's undertaking would, down to the time of its being wound up, enure entirely to the ordinary shareholders. And yet in so far as the price represented this increased future value the result of the decision is to give to the preference shareholders approximately one-half of it. Now, I do not mean to say that any principle can be laid down which will ensure perfect equality in this respect, but that which has been adopted appears to me to tend to raise the inequality to a maximum. The articles of association do not appear to me to afford the means of deciding this case upon any special grounds peculiar to this company. Their provisions are such as are commonly to be found regulating the distribution of profits in the case of joint stock companies. I think the determination of the question at issue must be arrived at upon principles wider and of more general application. In my opinion one consideration of essential importance, if an equitable distribution of the assets is to be attained, has been altogether lost sight of. The payment of £3 10s. per share was not the only contribution made by the ordinary shareholders to the assets of the company. They had each come under liability

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to pay the balance due on the shares held by them. Such a contribution might in many cases be just as valuable and tend just as effectually to the prosperity of the company as if they had actually paid the amount. I cannot think that this ought to be disregarded in estimating the respective rights and interests of members in the company and its property.

In the case of *Sheppard* v. *Scinde, Punjaub and Delhi Railway Company* (1) Bowen L.J. said: "Was the sum produced in any way by the liability to pay calls? That is a question of fact, and I am satisfied that the liability to pay calls was not in any way an element in the production of this purchase-money." I am not by any means prepared to say the same of this company. On the contrary I think it most probable, looking to the large sums of money raised on loan at a moderate rate of interest, that the liability of the shareholders did add very materially to the ease with which these loans were obtained, and to the consequent development and prosperity of the undertaking. In the same case Fry L.J. said: "It seems to me that in this case distribution must be proportionate to contribution. But it is said, suppose the property to have been produced not by unequal contributions but by unequal liabilities to pay, the proceeds must be distributed according to the unequal liabilities. I agree that in that case the distribution must be guided by the amount of the liabilities. I conclude that in this case the assumption of liability by the shareholders has not in any way produced the property, and that it cannot be said that the capital has been in the least increased by the liability." In the present case that learned judge appears to have discarded altogether these considerations, apparently because he thought the matter settled by the terms of the articles of association; but for the reasons I have given I cannot concur in this view. I am fortified by the observations of the two learned judges I have quoted in the view that a scheme of distribution which overlooks an important part of the contribution can scarcely be regarded as equitable. It would be impossible to my mind to enter upon an inquiry in each individual case how much the liability incurred and the money provided had respectively contributed to the prosperity of the company or the

(1) 36 W. R. 1.

value of its property. Some general rule must be laid down. I quite admit that it may be urged with force that if the distribution is to follow, not the paid-up but the subscribed capital, the liability would always be treated as of as much value as actual money. But if there must be a general rule and I have to choose between so regarding it or treating it as valueless, I believe the former would on the whole be the more equitable course. I of course exclude such a case as that of the Scinde Railway, where the constitution of the company determined the amount of purchase money to be given for the undertaking, and by the mode in which it was to be ascertained indicated what was the equitable mode of distributing it. In making these observations with reference to the unpaid liability upon shares I do not desire to be understood as indicating that they are decisive of the question how surplus assets are to be divided, but only as explaining why I cannot feel satisfied that the principle which has been adopted in the Court below is the correct one. Let me put an illustration which occurred to me whilst the appeal was under argument. Take the case of a company whose entire paid-up capital was obtained by the issue of preference shares bearing a limited rate of interest, nothing being paid upon the ordinary shares. The prosperity of such a company might be very largely due to the liability of the ordinary shareholders which might be just as valuable to the company as if they had paid a large sum on their shares, yet in such a case if the undertaking were sold, the whole of the surplus after discharging the liabilities of the company and returning their capital to the preference shareholders, would on the principle adopted by the Court below have been the property of such shareholders, and it must have been declared that the ordinary shareholders had no title to it, or to share in its distribution, that though members they had no "rights or interests" in the company. I admit that the case I have put is an extreme though it is not an impossible one, but I think it may well be put to test the equity of the principle laid down. It may be said that in the case I have put the profits could not be payable according to the amount paid up on the shares, and that in that case some other principle must be applied, and the amount subscribed or some other test must be taken. But if

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this be so the principle on which assets were to be distributed would be altered, it may be in a manner most detrimental to the ordinary shareholders, as soon as any call, however small, was made on the shares.

I turn now to the considerations which have led me to the conclusion that the surplus ought to be divided amongst the shareholders according to the shares which they hold in the company.

The present company has been prosperous, and the result of the winding-up is to leave a considerable surplus of assets over liabilities after returning all the capital. But I think we are naturally led to inquire how the different classes of shareholders would have been dealt with if the reverse had been the case, and a loss had resulted. This has been the subject of decision. It has been held, and I think rightly, that in such a case where there is no provision to the contrary in the articles of the company the loss is not to be borne in the proportion in which it has been declared in the present case that the surplus is to be distributed. In the case of the *Anglesea Colliery Company* (1) it was held by Lord Hatherley when Vice-Chancellor, and his judgment was affirmed on appeal, that the liquidators were entitled to make a call for the purpose of adjusting the rights of the members so that the losses should fall equally on all, without regard to the amount which they had paid up on their shares. And in the case of *Ex parte Maude* (2) where some of the shareholders had paid £20 and others £25 a share, and a surplus was left after discharging the liabilities of the company, the liquidators were held to be bound to pay out of these assets £5 to each shareholder who had paid £25 before distributing the surplus rateably. One of the articles of that company provided that the directors might declare a dividend to be paid to the shareholders in proportion to the number of their respective shares "and the amount paid up thereon respectively," and this was relied on as shewing that the loss ought to be proportioned to the amount paid up. Mellish L.J. however said: "In my opinion we cannot draw any inference from article 114 beyond that which it states, and we cannot infer that the shareholders meant to make such an important alteration as that in case of the company

(1) Law Rep. 2 Eq. 379; 1 Ch. 555. (2) Law Rep. 6 Ch. 51.

being wound up the losses should be divided in proportion to the amount paid up and not to the amount subscribed." And he held that the true view of the Companies Act was that the losses were to be borne, not in proportion to the amount paid up, but to the subscribed capital. Where the articles are silent on the subject, why should a different rule prevail as regards surplus assets? Where there is no agreement as to either it would seem only natural and equitable, that loss should be borne and benefits shared in the same proportion. And, in my opinion, this is the true principle to apply. In the course of the argument, I put the case of a company being wound up, having a large asset of doubtful value, and not capable of immediate realization. In such a case it might be necessary or prudent to call up the unpaid capital in order to discharge the liabilities of the concern, even though it turned out that this asset was more than sufficient to meet them. If the capital were thus called up the surplus would be distributed rateably amongst all the shareholders, whereas supposing the judgment under appeal to be correct, if the asset had been first realized, the distribution amongst the two classes of shareholders would have been very different. The rights and interests of the shareholders in the company would thus be made to depend on the urgency of the creditors or the timidity of the liquidators, a result neither satisfactory nor equitable. I observe that the same consideration occurred to Mellish L J. in the case I have just referred to. He said, "If any other construction were adopted it would make the way in which the losses are borne depend upon the accident whether the assets could be immediately realized, or whether it was necessary to make a call to pay the debts. If the £5 per share had been called up to pay pressing debts, it could not be denied that the assets when got in would be divided pro ratâ; that is to say, the losses would be borne by the shareholders in proportion to their subscribed capital. Here it happened that the assets were immediately realized or that the creditors did not press for payment, so that a call was not necessary before the assets were divided, but that accident ought not to alter the way in which the assets are to be divided." Surely all this applies with equal force to the profit resulting on the winding up of the undertaking. The

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truth is that each member who has subscribed for a £10 share owns the same share in the company whether it be or be not paid up, and if he is so regarded for the purpose of meeting losses, I cannot see that it is equitable that he should be otherwise dealt with when we are considering to what share of the profit he is entitled. When the whole of the capital has been returned both classes of shareholders are on the same footing, equally members and holding equal shares in the company, and it appears to me that they ought to be treated as equally entitled to its property. It may be that the principle which I recommend your Lordships to adopt will not secure absolutely equal or equitable treatment in all cases, but I think that it will in general attain that end more nearly than any other which has been proposed.

I am therefore of opinion that the judgment appealed from should be reversed; and that it should be declared that the balance of the proceeds of sale ought to be divided amongst the holders of all the shares in the Bridgewater Navigation Company Limited, in proportion to the shares held by them respectively.

I accordingly move your Lordships that the judgment appealed from be reversed, and that the declaration I have just read be made, and that (as agreed between the parties) it be further declared that the costs of the liquidators and of the appellant and the respondents, both in the court below and in your Lordships' House, as between solicitor and client upon the higher scale, may properly be retained and paid by the liquidators out of the assets of the Bridgewater Navigation Company.

LORD FITZGERALD:—

My Lords, my noble and learned friend who has just spoken has in his exhaustive judgment not only carefully given all the facts and criticised and disposed of the various contentions, but he has also examined the case in all its bearings and fully and clearly indicated his reasons for not adopting the decision of the Court of Appeal. I concur in the conclusion at which he has arrived, though I do not find it necessary to say that I accept all the reasons of my noble and learned friend. I am to be followed by a second elaborate speech from my noble and learned friend (Lord Macnaghten), the notes of which I have read, and as he

arrives at the same result I need not express my concurrence a second time. Coming between such weighty authorities I confidently anticipate your Lordships' sanction to my being concise.

The Bridgewater Canal Company Limited, formed in 1872, had become the proprietors of an extensive and valuable undertaking which appears, as far as we can judge, to have been worked ably and profitably with an increasing business down to 1880 when the company deemed it expedient to raise £600,000 for the purpose of paying off a mortgage of the like amount, and their financial plan appeared to be as follows—the company had already called up £250,000 of their subscribed capital—they made a further call of £1 a share, amounting to £100,000, and, in the exercise of the powers which they undoubtedly had, they passed a resolution calling into existence their uncreated capital by the creation of 30,000 further shares of £10 each, to be paid up in full within the two years succeeding. The terms and conditions on which the new shares were to be issued and the new shareholders to be received in respect of those shares as members of the company are fully stated in the letters of allotment. "Allotment letter, dated 27th April, 1880. The Bridgewater Navigation Company Limited, 5 per cent. preference shares. Sir, I beg to inform you that at an extraordinary general meeting of the members of the Bridgewater Navigation Company, Limited, held on the 27th April, 1880, the following resolution was passed:—That the balance of the uncreated capital of the company, namely, £300,000, be now created, and that there be issued 30,000 new shares of £10 each on the following terms and conditions, namely—(1). The new shares to entitle the holders thereof to a dividend after the rate of 5 per cent. per annum upon the amount for the time being called up thereon, and taking precedence of and priority over all dividends and claims of the holders of the ordinary shares of the company. (2). The calls upon the new shares to be payable as follows:—£1 per share on the 30th June, 1880; £1 10*s*. per share on the 31st December, 1880; £2 10*s*. per share on the 30th June, 1881; £2 10*s*. per share on the 31st December, 1881; £2 10*s*. per share on the 30th June, 1882. (3). Interest at the rate of 5 per cent. per annum to commence from the date when each call becomes due.

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(4). Any moneys paid and received with the consent of the directors in advance of calls to bear interest at the rate of 4 per cent. per annum. That in the first instance the new shares shall be allotted to the holders of ordinary shares registered in the books of the company at this date as near as may be in the proportion of three new shares for every ten ordinary shares. That any new shares not accepted by the members to whom they are allotted remain at the disposal of the directors, to be issued at such times, on such terms, and in such manner as they may think fit for the benefit of the company. An allotment of your proportion of the new shares is annexed hereto."

The subsequent practice of the company seems to have been to pay out of profits to the preference shareholders the preference dividend of £5 per cent., and the nett residue of the annual profits after deducting all outgoings and providing for a reserve was distributed equally amongst the holders of the original £10 shares on which £3 10*s.* only had been paid up.

The next step was the statute sale of the whole undertaking to the Manchester Ship Canal Company. It seems to have been a successful stroke of business for the Bridgewater Company, and probably was not a losing one to the Manchester Company, as they got a property necessary for the purposes of their great undertaking, and got it as a going and profitable concern, with fair prospects of increasing annual profits. The Bridgewater Company as a working company having thus come to an end, a voluntary winding-up was resorted to. The liquidators paid off every liability, and they further paid to the preference shareholders their whole capital with interest at 5 per cent., and to the ordinary shareholders their capital with their share of profits. The Bridgewater Company thus became clear of every liability, and the liquidators found that there remained the clear surplus of £550,000 to be distributed amongst those who had been the shareholders, whether ordinary or preference. The question is, on what principle is that surplus to be divided?

The case came first before North J. and the Court of Appeal adopted his decision. North J. says, at page 113: "I find, therefore, that the parties have not entered into any contract as to the mode of division of this surplus, and that it is to be

divided on equitable principles. There is little direct authority to assist me in the matter." I quite concur so far with the learned judge. At page 114 he adds: "But the question I have to decide is not what is a reasonable mode, but what is the equitable mode of distributing the increment in question. In my opinion the recent case before the Court of Appeal of *Sheppard* v. *Scinde, Punjaub, and Delhi Ry. Co.* (1) is so like the present as not only to assist me, but to furnish an authority I ought to follow." That case as an authority on the present appeal has been already disposed of by my noble and learned friend. North J. then quotes a passage from the judgment of Cotton L.J., in the Scinde Case:—"I think the general law is, that after providing for the capital at the credit of each partner, the surplus assets should be distributed in the proportions in which the capital has been contributed by the partners." There is the principle on which North J. acted as the equitable mode of distributing the surplus. The Court of Appeal adopted it.

My Lords, I have felt myself unable to act on this supposed rule as applicable to such an undertaking as the Bridgewater Canal Company Limited, and there is no authority for doing so. It may fit an ordinary common law partnership, but when applied to an association such as is now before us, it works out inequality and injustice and not equity. The error seems to me in supposing that there is an exact analogy between an ordinary commercial partnership and a statutable undertaking called into existence under the Joint Stock Companies Acts and regulated by the statute and its own memorandum of association and articles. There may be likeness in some particulars, but there is no real analogy.

Then what rule is to guide this distribution? There is in my opinion no contract to guide us in the circumstances which have arisen, and there is nothing to be found in the memorandum of association, or in the articles, or in the statutes, to give us any real help. The resolutions calling into existence the preference shares are equally a blank on the subject, but I have no doubt that the able men who then directed the affairs of the company, if they had foreseen the probability of a surplus on winding-up,

(1) 36 W. R. 1.

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would have been the last to agree to give up the lion's share to the preference shareholders.

Then, on what rule or principle are we to proceed? I concur in what my noble and learned friend has adopted as the equitable principle to be acted on. There is a clear stage to act on. The shareholders have been all reduced to one common level. Each shareholder of a share represents a former share in the company, and we have some authority that between the several classes of shareholders each represents £10 in the subscribed capital of the company, and that for the present purpose, and in this particular case, it matters not whether the £10 had been actually paid up in full, or subscribed for and partially paid.

We have some authority for this in *Oakbank Oil Company* v. *Crum* (1), which, though not an authority in point, at least imports that the proper interpretation of "share" is the shareholder's proportion in the subscribed capital of the company which appears in his name on the register of shareholders.

My Lords, I am clearly of opinion that the only equitable principle to be acted on in this case is that of *equality*. That is an equitable principle, and, in giving effect to that rule, each and every shareholder should receive in respect of his share an equal proportion of this surplus.

LORD MACNAGHTEN:—

My Lords, the question involved in this appeal is said to be novel. No direct authority on the point was cited. Nor am I aware of any, except a decision of Stirling J., *In re London and Brighton Stock Exchange Co. Limited*, on the 12th of August, 1887, which is only to be found in the *Times' Reports* (2). The case of *Sheppard* v. *Scinde, Punjaub and Delhi Ry. Co.* (3), which was treated as an authority in the courts below, has since been reviewed in this House, and, in affirming the decision of the Court of Appeal, every one of the noble and learned Lords who addressed the House relied simply and solely on the special circumstances of the case.

The question before your Lordships is this: In the liquidation

(1) 8 App. Cas. 65. (2) 4 Times L. R. 2.
(3) 36 W. R. 1.

of a company limited by shares, what is the proper mode of distributing assets not required for payment of debts and liabilities, or for the costs of the winding-up, or for the adjustment of the rights of the contributories amongst themselves? As incidental to that question, your Lordships have to consider whether the mode of distribution can be affected by one or more of the following circumstances:—(1.) That the shares of the company were paid up unequally, some being fully paid up, others being paid up only in part. (2.) That the fully-paid-up shares were issued separately as preference shares, carrying a preferential dividend of 5 per cent., without any further right to participate in the profits of the business. (3.) That by the regulations of the company dividends on the company's shares were payable in proportion to the amounts paid up thereon.

The answer, as it seems to me, must depend on the principles applicable to companies limited by shares, and on the provisions contained in the Companies Act, 1862. It is, perhaps, rather beside the mark to discuss the general doctrines of partnerships and to examine particular cases of partnership contracts. The scheme of the Act and the directions to be found there are, I think, a safer guide than any analogies can be.

Every person who becomes a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company, including its uncalled capital. He is liable in respect of all moneys unpaid on his shares to pay up every call that is duly made upon him. But he does not by such payment acquire any further or other interest in the capital of the company. His share in the capital is just what it was before. His liability to the company is diminished by the amount paid. His contribution is merged in the common fund. And that is all.

When the company is wound up, new rights and liabilities arise. The power of the directors to make calls is at an end; but every present member, so far as his shares are unpaid, is liable to contribute to the assets of the company to an amount

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sufficient for the payment of its debts and liabilities, the costs of winding-up, and such sums as may be required for the adjustment of the rights of the contributories amongst themselves.

In the case of compulsory winding up, the Act says, in sect. 109, that "the Court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that remains amongst the parties entitled thereto."

In the case of voluntary winding up, the language is not quite the same, and the directions are rather more explicit; not that there can be any difference as to the proper mode of distributing assets in the two cases; no one has suggested that. A sufficient reason for the difference of language is, I think, to be found in the circumstance that while the privilege of voluntary liquidation is confined to companies under the Act, any partnership or association consisting of more than seven members may be wound up compulsorily. To meet every case of compulsory liquidation it was necessary to use the most general language. Besides it is obvious that specific directions, useful and proper for the guidance of voluntary liquidators, are not so requisite when the liquidation is under the Court. As Lord Cairns points out in *Webb* v. *Whiffin* (1), "it was naturally thought important in the case of voluntary windings up to make specific provisions and to give specific directions as to matters which were supposed to be so plain and so necessarily consequential upon the general scheme of the Act, that in a winding-up under an order of the Court, it was not thought necessary to give express directions upon these matters of detail." I cannot therefore agree with Cotton L.J. that sects. 109 and 133 are to be read together, with the result that the more general language of sect. 109 is to neutralise or obscure the primâ facie meaning of the more specific directions given in the case of a voluntary winding-up.

The consequences that are to ensue upon the voluntary winding-up of the company are to be found in sect. 133. It is there provided that "the property of the company shall be applied in satisfaction of its liabilities, pari passu, and subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their

(1) Law Rep. 5 H. L. at p. 735.

rights and interests in the company." Then the section goes into details as to the powers of the liquidators, and ends by saying that "the liquidators shall pay the debts of the company, and adjust the rights of the contributories amongst themselves."

Now in the case of members of a company limited by shares, what are "their rights and interests in the company," in the absence of any special regulation, and what are the rights of the contributories amongst themselves which have to be adjusted in the winding-up?

Amongst the rights to be adjusted, the most important are those which arise when there is a difference between shareholders in the amount of calls paid in respect of their shares. Before winding-up no such rights exist; whatever has been paid by the shareholders of one issue in excess of the contributions of their fellow shareholders of a different issue, must have been paid in pursuance of calls duly made or in accordance with the conditions under which the shares were held. While the company is a going concern no capital can be returned to the shareholders, except under the statutory provisions in that behalf. There is therefore during that period no ground for complaint; no room for equities arising out of unequal contributions. In the case of winding-up everything is changed. The assets have to be distributed. The rights arising from unequal contributions on shares of equal amounts must be adjusted, and the property of the company, including its uncalled capital not required to satisfy prior claims, must be applied for that purpose. But when those rights are adjusted, when the capital is equalised, what equity founded on inequality of contribution can possibly remain? The rights and interests of the contributories in the company must then be simply in proportion to their shares. This was the view of Stirling J. in the case I have referred to. Your Lordships, however, were reminded more than once that "the Act does not say so." You were told that if that had been the meaning of the legislature, nothing would have been more easy than to have said in so many words that the distribution amongst the members should be "in proportion to their shares." This argument would have had much weight but for one circumstance. It overlooks the fact that the provisions for voluntary

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liquidation apply to some companies which have not a capital divided into shares.

It now only remains to deal with the various claims put forward in the course of the argument.

The ordinary shareholders say that the preference shareholders are entitled to a return of their capital, with 5 per cent. interest up to the day of payment, and to nothing more. That is treating them as if they were debenture-holders, liable to be paid off at a moment's notice. Then they say that at the utmost the preference shareholders are only entitled to the capital value of a perpetual annuity of 5 per cent. upon the amounts paid up by them. That is treating them as if they were holders of irredeemable debentures. But they are not debenture-holders at all. For some reason or other the company invited them to come in as shareholders, and they must be treated as having all the rights of shareholders, except so far as they renounced those rights on their admission to the company. There was an express bargain made as to their rights in respect of profits arising from the business of the company. But there was no bargain—no provision of any sort—affecting their rights as shareholders in the capital of the company.

Then the preference shareholders say to the ordinary shareholders, "We have paid up the whole of the amount due on our shares; you have paid but a fraction on yours. The prosperity of a company results from its paid-up capital; distribution must be in proportion to contribution. The surplus assets must be divided in proportion to the amounts paid up on the shares." That seems to me to be ignoring altogether the elementary principles applicable to joint-stock companies of this description. I think it rather leads to confusion to speak of the assets which are the subject of this application as "surplus assets" as if they were an accretion or addition to the capital of the company capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company—part and parcel of the joint stock or common fund—which at the date of the winding-up represented the capital of the company. It is through their shares in the capital, and through their shares alone, that members of a company limited

by shares become entitled to participate in the property of the company. The shares in this company were all of the same amount. Every contributory who held a preference share at the date of the winding-up must have taken that share and must have held it on the terms of paying up all calls duly made upon him in respect thereof. In paying up his share in full he has done no more than he contracted to do; why should he have more than he bargained for? Every contributory who was the holder of an ordinary share at the date of the winding-up took his share and held it on similar terms. He has done all he contracted to do; why should he have less than his bargain? When the preference shareholders and the ordinary shareholders are once placed on exactly the same footing in regard to the amounts paid up upon their shares, what is there to alter rights which were the subject of express contract?

Observe how unreasonable this contention on the part of the preference shareholders is. They do not propose to unravel the accounts of the company or to inquire how long the company had the benefit of the contributions from each of the two classes of shareholders, or what was the position of the company when those contributions were made. It may be that the founders of the company made a lucky hit at the outset. Good management may have had something to do with the success of the company. And after all, something may perhaps be put down to the fact that the ship canal company was forced to buy a property which lay directly in the track of its undertaking. The preference shareholders discard all these considerations. They take the date of the winding-up as the date which governs the rights of the shareholders in the distribution of what they call surplus assets. They say, "Our payments then were in excess of the payments of the ordinary shareholders." But that is a mere accident. There was a time not very long ago when the contributions of the ordinary shareholders were in advance of those of the preference shareholders. If the company had gone on they might soon have been on a level again. The prosperity of this company was certainly not due to the contributions of the preference shareholders. They did not come on the scene till just before the last act. It so happens that the very same directors' report which records their

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final payment, calls attention to the ship canal as a practical project. When the preference shareholders were invited to come in the prosperity of the company was assured. The business was flourishing; the shareholders were receiving dividends of 8 per cent. with occasional bonuses, and the directors were in a position to borrow at 4 per cent. Instead of borrowing, the company resolved to issue these preference shares, on the condition that they should be fully paid up within a limited time. As the company chose to admit Mr. Rigby's clients as shareholders they must have the rights of shareholders, but I cannot see why they should claim more.

Then it is said on behalf of the preference shareholders that the provision for payment of dividends in proportion to the amounts paid up on the shares leads to an inference that the distribution of surplus assets was to be made in the same proportion. I do not think that it leads to any inference of the kind. It is a very common provision nowadays, though it is not what you find in Table A. And it is a very reasonable provision, because during the continuance of the company, and while it is a going concern, it prevents any sense of dissatisfaction on the part of those who have paid more on their shares than their fellow shareholders of a different issue. But when it has come to an end I cannot see how it can be used to regulate or disturb rights with which it had nothing to do even while it was in force.

I am therefore of opinion that the judgment of the Court of Appeal must be varied, and that it should be declared that subject to the payment of the costs, charges and expenses of the winding-up, including the costs of all parties in this application here and in the courts below, the assets of the company remaining undistributed other than the reserve fund, which is not the subject of this application, ought to be distributed among all the shareholders in proportion to their shares.

Order appealed from reversed, and order of North J. varied by declaring that "the balance of the proceeds of sale of the said undertakings to the Manchester Ship Canal Company remaining after satisfaction of all the debts and liabilities

of the Bridegwater Navigation Company Limited, and after adjusting the rights of the shareholders inter se (other than their rights in respect of the purchase-money), and after payment of the costs of the liquidation and repayment to the shareholders (both ordinary and preference) of the capital respectively paid on their shares, ought to be divided amongst the holders of all the shares of the Bridgewater Navigation Company Limited in proportion to the shares held by them respectively;" subject to this variation the order of North J. affirmed; ordered that the costs of the liquidators and of the appellant and respondent Schofield in this House and in the Court below, as between solicitor and client upon the higher scale, may properly be retained and paid by the liquidators out of the assets of the Bridgewater Navigation Company Limited; cause remitted to the Chancery Division.

Lords' Journals 9th Aug. 1889.

Solicitors for appellant: *Cunliffe & Davenport, for T. E. Sampson, Liverpool.*

Solicitors for Schofield, respondent: *Burgess & Cozens, for Arthur Buckley, Manchester.*

Solicitors for the liquidators, respondents: *Cunliffe & Davenport, for Lingards, Manchester.*

[HOUSE OF LORDS.]

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HECLA FOUNDRY COMPANY AND OTHERS APPELLANTS;

AND

WALKER, HUNTER, & CO. . . . . RESPONDENTS.

Copyright of Designs—Infringement—Registration of Design "for Shape or Configuration"—Utility—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57).

The Patents, Designs, and Trade Marks Act of 1883 (46 & 47 Vict. c. 57), consolidates the law relating to the copyright of designs, and by sect. 60 "design" is defined as meaning "any design applicable to any article of manufacture or to any substance," "whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof."

The pursuers registered a design for the shape of a kitchen-range fire-door with a moulding on the top which had the effect of closing the range to cold air. The defenders manufactured a range fire-door with a moulding on the top which had the same effect.

Held, first, that the Court of Session (15 Court Sess. Cas. 4th Series, 660), in considering whether there had been an infringement of the copyright in the design for the shape of the fire-door were wrong in taking into account the question whether the defenders' design accomplished the same useful object (i.e. that of excluding cold air) as the design of the pursuers; but secondly, affirming the decision of the Court of Session, that there had been in fact an obvious imitation of the registered design and therefore an infringement of the copyright.

APPEAL from the judgment of the First Division of the Court of Session, Scotland (1), affirming an interlocutor of the Lord Ordinary interdicting the appellants from infringing the respondents' copyright in a registered design.

Walker, Hunter, & Co., the respondents, registered in November, 1884, in the terms of the Patents, Designs, and Trade Marks Act of 1883 (46 & 47 Vict. c. 57), a drawing or design of a kitchen-range fire-door. They described it as "a range fire-door with moulding on top: moulding forming front of range: SHAPE to be registered." This fire-door was intended to fit into the range,

(1) 15 Court Sess. Cas. 4th Series, 660.

and the moulding on the top corresponded to and ran flush with the moulding on the front of the hob of the range when the door was closed. The respondents complained that the appellants had infringed their rights by the manufacture of a similar fire-door.

The appellants' fire-door projected over the face of their range, and had a moulding on the top with fitted ends, which projected about three-eighths of an inch in front of the moulding on the range hob. It also had a handle, which the respondents' door had not. The feature of both doors was that the moulding on each accomplished the useful purpose of closing the space between the hob-plate and the top of the fire-box, and thus excluded the cold air. The respondents averred that previous to their registration no range fire-door had been made with mouldings on the top. That all convertible ranges had when closed a moulding running along the top, but prior to the registration that moulding had been attached either to the fall-bar of the range or to the cover-plate; and that the practical objections which attended the attachment of the moulding to either cover-plate or fall-bar were obviated by attachment to the fire-door. In a previous action brought by the respondents against the Falkirk Iron Company (1) the question whether the design was a proper subject of registration within the Act of 1883 (46 & 47 Vict. c. 57) was decided in the respondents' favour.

On the 16th of November, 1887, the Lord Ordinary held it proved that the appellants had infringed the respondents' copyright. This decision was affirmed by the First Division on the 25th of May, 1888 (2).

On appeal

June 24, 25. Sir *R. Webster*, A.G. (with him *Chadwyck Healey*), for the appellants:—

The word "shape" in 46 & 47 Vict. c. 57, must be taken to mean that which the design shews to the eye. But the respondents claim that by their design cold air is for the first time

(1) 14 Court Sess. Cas. 4th Series, 1072.

(2) 15 Court Sess. Cas. 4th Series, 660.

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effectually shut out by putting moulding on the top of the fire-door; and they allege that the appellants have appropriated their design by shutting out cold air. But registration of a design cannot be extended to the protection of the object accomplished by the design; and that only can be said to be an infringement which to the eye is substantially the same. In *Holdsworth* v. *M'Crea* (1) Lord Westbury said: "The eye alone is the judge of the identity of the two things."

If the respondents are right, then any door conclusively not of the same shape, which acts in the same way as the respondents' door, would be an infringement. The part of the Act of 1883 relating to Designs does not use the word "utility;" and, in fact, what is protected is the shape or configuration, and not the mechanical combination or purpose. Here the two doors fulfil a common purpose, but the difference is seen by mere comparison, and it cannot be said that the two doors are the same. He also cited *Margetson* v. *Wright* (2); *Millingen* v. *Picken* (3), *Reg.* v. *Bessell* (4), and *Hunter, Walker & Co.* v. *Falkirk Iron Company* (5).

Asher, Q.C., and *Ure* (both of the Scotch Bar), for the respondents:—

The only question before the House is one of fact whether the appellants' door is or is not an infringement of the respondents' copyright. The House, having the patterns of each door before it, can decide for itself. It is seen that the difference is immaterial. In *Le May* v. *Welch* (6) Fry, L.J., took into account the nature and character of the subject to which the design was to be applied. There is no doubt the Lord President erred in completely adopting the Lord Ordinary's opinion "that mere difference in the outline of the moulding would not take the appellants' design out of the protected copyright" (7). In *Holdsworth* v. *M'Crea* (8) it was held that a slight alteration of stars

(1) Law Rep. 2 H. L. at p. 388.
(2) 2 De G. & Sm. 420.
(3) 1 C. B. at p. 808.
(4) 16 Q. B. 810.
(5) 14 Court Sess. Cas. 4th Series, 1072.
(6) 28 Ch. D. 24.
(7) 15 Court Sess. Cas. 4th Series, at p. 664; see post, 553.
(8) Law Rep. 6 Ch. 418.

did not prevent the design from being infringed. *Reg.* v. *Bessell* (1) raised a different question.

Chadwyck Healey replied.

Judgment after consideration.

LORD HERSCHELL:—

My Lords, this is an appeal from an interlocutor of the First Division refusing a reclaiming note against an interlocutor of the Lord Ordinary finding it proved that the appellants at your Lordships' bar had infringed the respondents' exclusive privilege of making for sale fire-doors of the pattern produced, and interdicting the appellants accordingly.

The respondents, in November, 1884, registered a design, the nature of which was stated in the application to be "range fire-door with moulding on top; moulding forming front of range; *shape* to be registered."

The drawing which accompanied the application shewed a rectangular door for a fire range, with a moulding at the top of it of a form which appears to be known as ogee.

The sole question for determination is, whether a fire-door manufactured by the appellants is an infringement of the right secured to the respondents by the registration of their design. It undoubtedly is so if it is either the same design or a fraudulent or obvious imitation of it.

The Lord Ordinary, in delivering his opinion, used the following language: "Now, upon the question of whether there is here an infringement, nothing was said to the contrary of the complainers' proposition that mere differences in the outline of the moulding would not take the respondents' design out of the patented copyright. That seems to me perfectly clear, because there is nothing original in the moulding, and in the claim of registration it is made evident that the registration was claimed, not for the particular moulding, but for the material form given by placing a moulding, any suitable moulding, upon a fire-door in the described position. Well, then, I have to consider, if there was no exclusive

(1) 16 Q. B. 810.

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privilege claimed for the particular pattern of moulding, whether the exclusive privilege is limited to the case of a moulding which exactly fits into the adjoining mouldings so as to present a continuous flowing surface; or whether it is not a privilege granted for putting such a moulding upon a fire-door in such a manner as to exclude air and to accomplish the object which had been previously accomplished by putting the moulding upon the fire-cover or fall-bar." (1) The Lord President adopted this language of the Lord Ordinary, and the view which he had taken of the subject matter of the claim of the present respondents.

My Lords, with all respect for these learned judges, I cannot but think that they took into account elements which were not proper to be considered for the purpose of determining what was the design protected by the registration, and whether there had been an infringement of the copyright in that design.

By sect. 60 of the Patent and Designs Act of 1883 "design" is defined as meaning any design applicable to any article of manufacture or to any substance, "whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof." In the present case the applicant declared that it was for "the shape" that he desired registration. Under the Designs part of the Act of 1883, I do not think the object which the designer has in view in adopting the particular shape, or the useful purpose which the shape is intended to serve, or does serve, ought to be regarded in considering what is the design protected. The scheme of this part of the Act is entirely different from that relating to patents for inventions, where the object attained by the invention for which the patent is granted is, of course, very material to the inquiry what is its subject matter, and whether there has been an infringement. I cannot agree, therefore, that the registration was claimed, or could be claimed, "not for the particular moulding" but for the form given by placing "any suitable moulding" upon a fire-door in the described position, or that a privilege was granted "for putting a moulding upon a fire-door in such a manner as to accomplish" a particular object. I think the protection was granted for the shape, and for that alone, and that in such a case, when an infringement is

(1) 15 Court Sess. Cas. 4th Series, at p. 663.

alleged, the only question is, whether the shape of that which is impeached is the same, or whether the one is an obvious imitation of the other, without reference to whether it does or does not accomplish the same useful end. I quite agree with what was said by Lord Shand in *Walker* v. *Falkirk Iron Company* (1), that "the Act in this branch gives protection only to the shape or configuration or to the design for the shape or configuration, in such a case as the present. The result of such protection may be, however, to secure important advantages, such as attend a mechanical contrivance, if these advantages should be the result, directly or indirectly, of the shape or configuration adopted." But this is a mere incident. If such advantages are obtained, it is only because no shape not substantially the same, and which is therefore not an infringement, will achieve the same end. The test of infringement must always be whether the shape is or is not the same. If it be, then the exclusive privilege has been infringed, even though the same object be not accomplished; if it be not, then, though the object be accomplished, there has been no infringement. In the present case, for example, by a very slight deviation from the design, which would scarcely be apparent, the air might be admitted to the fire. I do not think that a person making such a fire-door could successfully answer the complaint that he had infringed the rights of the proprietor of the design, by shewing that, when applied to a range, it would not exclude the air.

It seems to me, therefore, that the eye must be the judge in such a case as this, and that the question must be determined by placing the designs side by side, and asking whether they are the same, or whether the one is an obvious imitation of the other. I ought, perhaps, to qualify this by saying that, as a design to be registered must, by sect. 47, be a "new or original design, not previously published in the United Kingdom," one may be entitled to take into account the state of knowledge at the time of registration, and in what respects the design was new or original, when considering whether any variations from the registered design which appear in the alleged infringement are substantial or immaterial.

(1) 14 Court Sess. Cas. 4th Series, at p. 1081.

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Applying the test which I have laid down, I have come to the conclusion that there has been a violation of the respondents' rights. There are, no doubt, certain distinctions between the door shewn on their drawing and that manufactured by the appellants. But to establish this is not enough to free them from liability. By sect. 58 of the Act, it is not lawful for any person to apply either the design "or any obvious imitation thereof" in the same class of goods in which the design is registered. It is impossible in such a case as the present to give reasons for the opinion formed. I can only say that to me it appears, without doubt, that the door complained of is an obvious imitation of the registered design.

I therefore move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, the evidence led before the Lord Ordinary shews that, until 1884, kitchen ranges were commonly made with a cornice or ogee moulding running along the whole front of the range, that part of the moulding which is opposite to the furnace being invariably attached either to the fire-bar, or to the hot-plate which forms the cover of the range. In November of that year the respondents registered, in terms of the Act of 1883, the drawing or design of a door, which in compliance with the statutory rules issued by the Board of Trade they described as a "range fire-door, with moulding on the top; moulding forming part of front of range; Shape to be registered."

The witnesses appear to have generally agreed that the attachment of the moulding to the fire-door, or making it part of the door itself, as shewn in the respondents' design, was an improvement upon previous arrangements, because it obviated various disadvantages which were inseparable from these arrangements. That may be so, but in my opinion such considerations are of no relevancy in the present case. It is quite immaterial, for the purposes of registration under the Act of 1883, whether a design is useful or devoid of utility. All that the statute requires, in order to its registration and protection, is that it shall be new or original and shall not have been previously

published in the United Kingdom; and the person registering acquires no exclusive right, except to the shape and configuration of his design. If his design should be calculated to serve some useful purpose, it is nevertheless open to every member of the public to attain the same end by using an article which differs from it in shape and configuration. The statutory prohibition, which constitutes the measure of his privilege, is to the effect that, so long as his copyright endures, it shall not be lawful for any person, without his licence or consent in writing, to apply his design, "or any fraudulent or obvious imitation thereof," in the class of goods in which such design is registered.

Accordingly, the only relevant consideration in any question of infringement is, whether the article complained of is a copy, or a fraudulent or an obvious imitation of the registered design? The observations which were made by Lord Westbury in *Holdsworth* v. *M'Crea* (1) with reference to the acts now repealed, are, in my opinion, equally applicable to the provisions of the recent statute. His Lordship there said: "Now, in the case of those things as to which the merit of the invention lies in the drawing, or in forms that can be copied, the appeal is to the eye, and the eye alone is the judge of the identity of the two things. Whether, therefore, there be piracy or not is referred at once to an unerring judge, namely, the eye, which takes the one figure and the other figure, and ascertains whether they are or are not the same."

I agree with my noble and learned friend on the woolsack that the appellants' fire-door is an obvious imitation of the respondents' registered design; and I am therefore of opinion that this appeal must be disallowed.

LORD FITZGERALD:—

My Lords, I concur in the two judgments which have just been delivered. I may remind your Lordships that, in the course of the discussion at the bar, one of the learned counsel for the respondents asked us to put the two things side by side, and said that we should see by a look that the article produced by the appellants was an obvious imitation of the registered design of the respondents. My Lords, I looked minutely at the two

(1) Law Rep. 2 H. L. at p. 388.

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things then, and I came to the conclusion that the door of the appellants was clearly an obvious imitation of the registered designs of the respondents, and from that moment I thought the argument was at an end.

Interlocutors appealed from affirmed, and the appeal dismissed with costs.

Lords' Journals, 8th August, 1889.

Agents for the appellants: *Martin & Leslie, for J. & J. Ross, W.S., Edinburgh.*

Agents for the respondents: *Grahames, Currey & Spens, for Auld & Macdonald, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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RAE AND ANOTHER (PAUPERS) . . . . . APPELLANTS;

AND

MEEK . . . . . RESPONDENT;

AND

HOTSON & HOWIE, AND OTHERS . . . RESPONDENTS.

Trust—Investment—Insufficient Security—Liability of Trustees and Law Agent—Beneficiary with Contingent Interest, Title to sue.

The defender M. was trustee under a marriage contract, by which the wife's property was settled on herself for life, excluding the jus mariti; and, in case she survived her husband, to her in fee; but, should she predecease her husband, to him for life or until his second marriage; and lastly, in the event of her predeceasing her husband, to her children in fee, after her husband's decease or second marriage. The defender M. and the husband and wife—who were also trustees—lent this trust fund on the security of unfinished houses in course of erection under a building speculation. The only valuation the trustees had before them was one by an architect, which had been obtained by the borrower, but they consulted the defender H., who was their law agent, and were informed by him that there was no objection to the investment.

The deed contained an immunity clause exonerating the trustees from "omissions or neglect of diligence, or the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases."

The pursuers, the children of the marriage, while both spouses were alive, brought an action for a declarator that the defender M. and the law

agent were jointly and severally liable to restore the fund, which had been lost by the failure of the speculation:—

Held, reversing the decision of the Court of Session (15 Court Sess. Cas. 4th Series 1033), that there had been a positive breach of duty on the part of the defender M., and that he was liable—the pursuers' rights being contingent, and the husband and wife being barred from any relief against him—to restore the trust fund by paying it to a judicial factor appointed by the Court to abide the event, if and when the pursuers became entitled:

Held, also, affirming the decision of the Court of Session, that the law agent was not liable, for there was no evidence to prove that he had been employed by the pursuers or any person on their behalf.

APPEAL from the Court of Session, Scotland (1).

The appellants were Miss Jane D. R. Rae and Miss Agnes L. R. Rae (now Clarke), the two daughters and only children of the Rev. Robert Reid Rae and Mrs. Rae.

The respondents were (1) John Meek, a retired West Indian merchant, and one of the trustees under Mr. and Mrs. Rae's ante-nuptial contract of marriage; (2) the firm Hotson & Howie, law agents, acting for the trustees at the date of the transaction in question; the surviving partner, Robert Howie; and the representative of the other partner, Hamilton A. Hotson.

The action was also directed against Mr. and Mrs. Rae, but they did not appear.

The question was whether John Meek was personally liable, either alone or jointly, with the co-trustees and Messrs. Hotson & Howie, the legal advisers of the trust, for the loss of £4500, part of the trust estate.

Mr. and Mrs. Rae were married on the 7th of September, 1852, and by ante-nuptial contract Mrs. Rae conveyed her property of £5000 to the trustees. First, for behoof of herself in life-rent during the marriage, exclusive of the jus mariti, and, in case of the prior decease of her husband, to herself, her heirs and assignees in fee; secondly, in the event of her own death prior to her husband, to him in life-rent, so long as he shall remain unmarried; and thirdly, in case of the dissolution of the marriage by the event last mentioned, and of there being a child or children surviving at the decease or second marriage of Mr. Rae,

(1) 15 Court Sess. Cas. 4th Series, 1033.

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and attaining twenty-one, or, if a daughter, being married, for behoof of such child or children in fee. The trustees had the power to sell, and were to reinvest either in the purchase of "heritable property, feu duties, ground annuals, or government bank stock, or heritable securities, or even upon such personal securities or obligations" as they might approve as good and sufficient.

The contract contained this immunity clause:—"The said trustees shall not be answerable for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases, nor singuli in solidum, or for the intromission of each other or of their factor, but each for his or her actual intromissions under deductions of all payments bonâ fide made in fulfilment of the premises."

The trustees were Mr. and Mrs. Rae (the latter a sine quâ non), John Meek, and others.

Early in 1874 £4750 of the £5000 trust money was available for reinvestment, and at a meeting of the trustees it was resolved "to look for heritable securities of adequate value, and Mr. Hotson was to be on the outlook for such, and to report to the trustees any proposal he might receive." Subsequently negotiations were opened with Messrs. Brownlie & Watson for a loan of £4500 over subjects in Gallowgate, Glasgow, the property of William Anderson. These were unfinished buildings, consisting of warehouses and shops, which had been erected at an alleged cost of £30,000 in the place of very inferior dwellings cleared away in the course of city improvements. The site had been acquired at auction by the borrower, the price being converted into a ground annual.

On the 5th of May, 1874, a meeting of the trustees was held in the law agent's office, at which Mr. and Mrs. Rae and John Meek were the only trustees present. The minute of that meeting was that "there were laid before the meeting rental and valuation of several heritable properties on which loans were wanted, after considering and comparing which the trustees resolved to make a loan of £4500 to Mr. William Anderson, one of the applicants on the security of the building in Gallowgate, valued by Mr. Burnet, architect, at £6500 provided always Mr. Hotson shall

be satisfied with the title." The interest paid on the loan was 4½ per cent. Mr. Burnet's valuation was contained in a communication to the borrower's agents and said: "Having carefully examined that property to the eastward of the property at the corner of Gallowgate Street, and the lane leading to Spoutmouth Street, both belonging to Mr. William Anderson, I find that it consists of a plot of ground, containing 361 square yards, or thereby, having a frontage of 41 feet 9 inches to Gallowgate Street, and is covered with buildings to be occupied as a shop and warehouse. I am of opinion that when the buildings are finished, papered and painted, ready for occupation, the property will be worth £6500 over and above the annual feu duty of £191 19*s.* 1*d.*"

The trustees obtained no independent valuation, nor did they inspect the buildings. The buildings were finished in 1875, but were never sufficiently let to pay the ground annual of £191 19*s.* 1*d.* The interest was paid until 1878, when the mortgagor was sequestrated, and the buildings have since been unsaleable.

The appellants raised this action in 1886 and averred that the sum of £4500 was lost, through the gross negligence and neglect of duty of the trustees who were present at the meeting of the 5th of May, 1874, and through the gross negligence and want of skill of Messrs. Hotson & Howie; that the investment was one which no prudent or reasonable man would ever have made; that Mrs. Rae and her husband were ignorant of business affairs and of what was a prudent investment, and they relied upon the knowledge, skill, and carefulness of Mr. Meek and Messrs. Hotson & Howie; that the buildings were of a speculative character for which there was no demand in the locality; that the defenders had not even before them at the time of granting the loan any estimated rental; neither did the trustees nor their law agents make any inquiry to ascertain what revenue the property yielded after it was completed; that Messrs. Hotson & Howie grossly failed in their professional duty in allowing the trustees to invest in such a speculation; that it was through their advice and on their investigation that the investment was made, and that it was their duty as the professional advisers of the trustees to have

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prevented their investing the trust funds on unbuilt or unlet property.

Mr. Meek lodged separate defences and averred:—he acted in the circumstances with all ordinary care and prudence, relying on the advice of competent professional men. Mr. Meek in his evidence alleged he asked Mr. Hotson whether they were right in lending upon a property that was in the course of being built, that he answered there could be no objection on that score; and that Mr. Hotson said in reference to a question as to Mr. Burnet's valuation that Mr. Burnet was a very safe man to deal with.

The action was raised against the trustees (including Mr. and Mrs. Rae) and Messrs. Hotson & Howie, and concluded for declarator that the defenders were conjointly and severally, or in such other way or manner as shall seem just, bound to make payment to the said John Meek, J. E. Rae, Robert Reid Rae, as trustees of the sum of £4500 with interest to be applied in conformity with the purposes of the trust.

The Lord Ordinary (Lord M'Laren) being of opinion that it would neither be just to the trustees nor their law agents to allow claims depending on different facts, raising different legal considerations, and inferring distinct degrees of responsibility to be tried under the same action and the same order of proof, gave the appellants the option of abandoning the action against the law agents; but as the option was not exercised his Lordship pronounced an interlocutor on the 12th of June, 1886, dismissing the action.

The Second Division on the 29th of June, 1886 (1), recalled this interlocutor and allowed a proof which was taken before Lord Craighill. The case was subsequently argued before the Second Division and four judges of the First Division.

On the 20th of July, 1888, an interlocutor was pronounced which assoilzied the defenders from the conclusions of the action (2).

The Lord President (Inglis), the Lord Justice Clerk (Moncreiff), Lords Young and Adam, were in favour of the non-liability of the defender Meek. Lords Mure, Shand, and Rutherfurd-Clark

(1) 13 Court Sess. Cas. 4th Series, 1036.

(2) 15 Court Sess. Cas. 4th Series 1033.

were of opinion Meek was liable. Only Lord Young was of opinion the law agents were liable.

While the case was proceeding in the Court of Session one of the appellants, Miss Agnes L. Reid Rae, had married Mr. Clarke, a gentleman said to have an income of £300, and who was not a party to the proceedings; and the question whether she could continue to sue in formâ pauperis came before the appeal committee. Their Lordships allowed her to do so. They also allowed the respondent Meek and the law agents to lodge separate printed papers, and to have separate counsel at the hearing.

On appeal,

June 25, 27, 28. *Asher*, Q.C., and *Rhind* (both of the Scotch Bar) (with them *A. S. D. Thomson*, of the Scotch Bar, and *J. R. McIlraith*), for the pursuers:—

The judgment of the Court of Session is inconsistent with *Knox* v. *Mackinnon* (1). It is not denied that the appellants' interest is contingent on their father surviving their mother, yet, for all that, they are entitled now to obtain protection for their contingent interest. All they can ask of the defender Meek is that he shall restore the corpus of the estate so that it may be available if and when the pursuers become entitled. The trustees were guilty of gross culpability in lending the fund on such security. The evidence confirms the view that the loan was made solely upon Mr. Burnet's letter, a valuation made for the borrower, and that such valuation was the sole and only information the trustees had. Further, they made the loan without even an estimate of what the rent would be; nor did they inspect the property.

The pursuers rely on the original transaction, although there is an averment that the trustees might have got the money back afterwards by a sale of the buildings. The security was bad from the beginning. All the circumstances prove there was on the part of the trustees crassa negligentia. In *Whiteley* v. *Learoyd* (2) Lord Halsbury, L.C., said: "I do not think it is true to say one is entitled to consider the special qualities or degree of intelligence of the particular trustee. Persons who accept that office

(1) 13 App. Cas. 753, at p. 766. (2) 12 App. Cas. 727, at p. 731.

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must be supposed to accept it with the responsibility, at all events, for the possession of ordinary care and prudence." See also Lord Watson in *Knox* v. *Mackinnon* (1). Here the defender Meek relies on the immunity clause; but it was held in *Seton* v. *Dawson* (2) that these clauses were never meant to go the length that a trustee might grossly neglect his trust, and then plead exoneration from liability under the clause of immunity.

In the case against the law agents the pursuers rely on Lord Young's opinion (3). They were employed by the trustees on behalf of these beneficiaries to judge of the security. Here the trustees alleged they employed a competent law agent.

[LORD WATSON:—You do not allege a case of contract.]

The law agents became participants in the wrong; and both the trustee and the law agents ought not to escape; the trustee on the ground that he employed a competent law agent; and the law agents on the ground that they were not employed by the appellants.

The Dean of Faculty (*Balfour*, Q.C.), and *G. W. Burnet* (both of the Scotch Bar), for the respondent Meek:—

It is not disputed that by the common law the general liability of trustees is, if not modified by the deed under which they act, to give to the administration of the estate the same care as a prudent man gives to his own. In considering what is the standard of prudence, one must consider the type or class of person. If, for instance, the trustee were a lady or a farmer, then a different degree of prudence would be looked for, and the trustee's conduct should be examined by the standard of prudence applicable to a prudent man of his class. The standard is also to some extent fixed by the trustee in the immunity clause, which modifies the common law rule. The defender Meek must be taken to have satisfied either standard. A trustee is not liable if he obtains competent professional advice: Jessel, M.R., in *Speight* v. *Gaunt* (4).

(1) 13 App. Cas. 753, at p. 766.
(2) 4 Court Sess. Cas. 2nd Series, at pp. 324, 316.
(3) 15 Court Sess. Cas. 4th Series, at pp. 1056.
(4) 22 Ch. D. 727, affg. 9 App. Cas. 1.

It is not attempted to make out a case of complete delegation; but that the trustees placed reliance on the law agent, and had reason to believe that the valuation was one they could rely on. The defender Meek, who was a retired West Indian merchant, with no great experience of land property, asked the law agent if Mr. Burnet's valuation could be relied upon, and the answer was he was a very safe man. Looking, therefore, to all the circumstances, it may be assumed that a prudent man of his class would not have asked further questions.

In *Whiteley* v. *Learoyd* (1) Lord Watson said, if the trustee employs a valuator and relies on that, that is enough. *Knox* v. *Mackinnon* (2) was a case of accommodation, and must be read in the light of the facts. See also as to the liability of law agents Lord Craighill in *Ronaldson* v. *Drummond & Reid* (3); *Kennedy* v. *Kennedy* (4); and *Oastler* v. *Dill, Smillie & Wilson* (5).

Secondly, the object of the immunity clause is to afford the trustee some protection. And in order to deprive a trustee of the benefit of such a clause the negligence must be of such a character that the trustee cannot be heard to say it is not fraud.

Lord Balgray said in *Blain* v. *Paterson* (6): "The truster was entitled to confer as extensive powers on his trustees as he chose, and to surround them with as strong protection and immunities as he thought right for encouraging them to undertake the gratuitous office which he imposed on them. But, allowing for all this, the trustees must still be liable for culpa lata, or conduct amounting to that which in law is held equivalent to fraud."

In *Cowan* v. *Crawford* (7) Lord Justice Clerk Boyle considered culpa lata equal to fraud. He said, the trustee "must be found either to have acted fraudulently or to have shewn that crassa negligentia quæ æquiparatur dolo." See also *Thomson* v. *Campbell* (8)

(1) 12 App. Cas. 727.
(2) 13 App. Cas. 753.
(3) 8 Court Sess. Cas. 4th Series, at p. 779.
(4) 12 Court Sess. Cas. 4th Series, 275.
(5) 14 Court Sess. Cas. 4th Series, at p. 12.
(6) 14 Court Sess. Cas. 1st Series, at p. 370.
(7) 14 Court Sess. Cas. 1st Series, at p. 750.
(8) 16 Court Sess. Cas. 1st Series, at p. 569.

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[LORD WATSON mentioned *Seton* v. *Dawson* (1), where all the judges were summoned to settle the law.]

The words "Neglect of Diligence" in the immunity clause do not mean, as the appellants argue, neglect of taking process; but, as Lord Moncreiff held in *Seton* v. *Dawson* (2), they mean, want of Diligentia, e.g. care; and these words exonerate where the trustee acts without due care; and the word "omission" where he does nothing. A plainly worded immunity clause is sufficient to exonerate: *Ainslie* v. *Cheape* (3). What is proved here is not total neglect, but error in performance—error of judgment. Therefore, whether the standard of the common law is taken, or that lesser standard set out in the immunity clause, the respondent Meek made as much inquiry as a prudent man of his class would have done in his own affairs, and is not liable.

Besides, the error here was an ordinary one, the practice in Glasgow being at that time to lend money without obtaining an independent opinion. If, therefore, lending money without further valuations and investigations was a fault, anybody at that time would have committed it; and the result, even if greater precautions had been taken, would not have been different.

Rigby, Q.C., and *Law* (of the Scotch Bar) for the respondents, the law agents, were not called upon, but asked, as this was a pauper case, that their costs should be a prior preference on the fund in medio.

Rhind, in reply, cited *Forsyth, Curator bonis* to *Hoyes* (4).

[LORD WATSON:—That is a different case; the trustee there was a paid officer)]:

Byrne v. *Norcott* (5); *Drosier* v. *Brereton* (6); *Stretton* v. *Ashmall* (7); *Budge* v. *Gummow* (8).

(1) 4 Court Sess. Cas. 2nd Series, 310.
(2) 4 Court Sess. Cas. 2nd Series, at p. 328, 331.
(3) 13 Court Sess. Cas. 1st Series, 417.
(4) 15 Court Sess. Cas. 2nd Series, 345.
(5) 13 Beav. 336.
(6) 15 Beav. 221.
(7) 3 Drew. 9.
(8) Law Rep. 7 Ch. 719.

Judgment after consideration.

LORD HERSCHELL :—

My Lords, the circumstances of this case are somewhat peculiar. The appellants are the children of the marriage of Robert Reid Rae and Jessie Croil, and the defendant Meek is one of the trustees of the marriage contract between these parties entered into on the 7th of September, 1852. Under this contract Robert Reid Rae and his wife were also appointed trustees, a major part of whom was to form a quorum, the wife during her lifetime being a sine quâ non. By this contract Jessie Croil conveyed all her estate inherited from her deceased father to the trustees named in it for behoof of herself in life-rent, and in case she survived her husband absolutely in fee. In case Robert Reid Rae survived her, he was to enjoy a life-rent so long as he remained unmarried. Upon his death or marriage the property was to pass to the children of Robert Reid Rae and Jessie Croil. The trustees were authorized to invest the trust property "in the purchase of heritable property, feu duties or ground annuals, or government or bank stocks, or heritable securities, or even upon personal securities or obligations" as they might approve of as good and sufficient.

In 1874 the trustees sold a portion of the trust property for £2750, and received payment of another sum of £2000 which had been lent on heritable security. They had thus £4750 to invest. On the 5th of May in that year a meeting of the trustees took place at which Mr. and Mrs. Rae and Mr. Meek were present, when it was resolved that a loan should be made to Mr. William Anderson on the security of unfinished buildings in the Gallowgate, Glasgow, provided Mr. Hotson, their law agent, should be satisfied with the title; and that such part of the loan should be deposited in a bank in the joint names of the parties' law agents as Mr. Burnet, (an architect who had valued the buildings,) should deem to be sufficient for finishing them.

The loan was accordingly made, and the entire sum of £4500 ultimately paid to Anderson. I shall have presently to revert to the circumstances attending the loan, but it will suffice for the present to state that the transaction turned out a disastrous

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one for the trustees, and that the money lent has been lost to the trust estate. This action has been brought by the present appellants to compel the defendant Meek to make good the loss. The law agents who acted for the trustees at the time of the loan were joined as defendants, and the same relief was claimed against them.

The Lord Ordinary required the appellants to elect whether they would proceed against the trustee or the law agents, and, on their declining to do so, dismissed the action on the ground that the trustee and the law agents ought not to have been sued in the same action. This interlocutor was recalled by the Inner House, and the parties were allowed to proceed to proof. After proof had been led, the cause was argued before the Second Division, and the judges of the First Division of the Court. The Lord President, Lord Justice Clerk, and Lord Adam delivered their opinions in favour of all the defenders. Lord Young concurred in thinking that the defender Meek was not liable, but held that a case had been made out against the law agents. Lords Mure, Shand, and Rutherfurd Clark thought that the liability of the trustee had been established, but that there was no case against the law agents.

My Lords, at the conclusion of the argument of the learned counsel for the appellants, all your Lordships were of opinion that they had failed to shew any ground for their action against the law agents. I share the difficulty which was felt by the Lord Ordinary (1). I cannot see how the law advisers could in any view be held liable to restore to the trust fund the money lost, which was the claim against the other defender. If an action be maintainable against them at all, it could only be to compel payment of such damages as the appellants have sustained by reason of their failure of duty. And, considering the contingent nature of the appellants' interest in the fund, it is obvious that this must be something very different from the amount of the loss to the estate. Liability as against the defenders, with whose case I am now dealing, could, in my opinion, only be established by proof that they were employed to give advice either by the appellants or by some person on their behalf, and that, having undertaken

(1) 13 Court Sess. Cass. 4th Series, 1036.

this employment, they neglected their duty. Now, they certainly were not employed by the appellants, nor do I think they were employed on their behalf. The alleged duty, if it existed at all, was to the trustees, and not to the beneficiaries. If there has been a breach of it, the trustees and not the beneficiaries are the parties to sue. There may be cases where, if trustees failed to call to account those who were under liability in respect of acts injurious to the trust estate, the beneficiaries might compel them to do so, or even enforce the right themselves. But no such question is raised by the averments in the present action. And, further, I think it right to say that in my judgment the evidence does not establish that the law agents were employed to advise the trustees as to the sufficiency of the security, or that they acted on any such advice. It seems to me, therefore, that the case against these defenders entirely fails, and that the appeal as against them ought to be dismissed.

I turn now to the case against the defender Meek, which has given rise to such divergence of opinion amongst the learned judges in the Court below. I may remark at the outset that if a breach of duty on his part has been proved I think it is competent for the appellants to maintain this action. It is clear that neither Mr. nor Mrs. Rae could obtain any relief against the defender Meek, for if there has been a violation of duty they were as much parties to it as he was. They cannot claim to have the sum lost replaced, to be held on the trusts of the marriage contract so far as those trusts are for their benefit. But I see no reason why the appellants may not claim to have their contingent interest under the trusts of the marriage contract protected.

The law bearing upon the liability of trustees has been recently considered by your Lordships in the cases of *Whiteley* v. *Learoyd* (1) and *Knox* v. *Mackinnon* (2), the one coming from the English, the other from the Scotch Courts. I think these cases establish that the law in both countries requires of a trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs. The Lord President in the present case did not adopt this as the test. "We must not demand," he said, "of Mr. Meek any more prudence, or diligence,

(1) 12 App. Cas. 727. (2) 13 App. Cas. 753.

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or knowledge, than he actually possesses or uses in the management of his own business. For that purpose we must consider what Mr. Meek is." As a result of this consideration he came to the conclusion that Meek was not a man of business habits, or of great intelligence or discretion. I do not think the inquiry thus entered upon was a relevant one. The test which the Lord President applied was rejected as erroneous by this House in *Knox* v. *Mackinnon*. Lord Watson there said (1): "It was seriously argued that, according to the law of Scotland, the responsibility of a gratuitous trustee must (apart from any special dispensation by the truster) be tested by reference, not to an average standard, but to the degree of care and prudence which he uses in the management of his own private affairs. The rule, which is quite new to me, would be highly inconvenient in practice. In every case where neglect of duty is imputed to a body of trustees it would necessitate an exhaustive inquiry into the private transactions of each individual member,—the interest of the trustee being to shew that he was a stupid fellow, careless in money matters: and that of his opponents to prove that he was a man of superior intelligence and exceptional shrewdness."

I think, therefore, that the ground upon which the Lord President and the learned judges who concurred with him rested their judgments upon this part of the case cannot be supported.

Has it, then, been shewn that the trustee failed to exercise that degree of diligence which a man of ordinary prudence would exercise in the management of his own affairs? In order to answer this question it is necessary to lay the facts before your Lordships more fully than I have hitherto done.

The buildings which were to form the security for the loan agreed upon, at the meeting of the trustees to which I have referred, were an unfinished portion of a large block which the borrower was erecting in Gallowgate, upon a site which was part of an area cleared of a very inferior class of buildings in the course of the city improvements. The ground annual upon that portion which was to be the security of the trustees amounted to £192.

(1) 13 App. Cas. at p. 766.

The buildings in course of erection were intended for use as warehouses and offices, and were of a character hitherto unknown in that locality. The only guide which the trustees possessed as to the adequacy of the security was an estimate of Mr. Burnet, who valued the buildings when finished at £6500 over and above the annual feu duty. This valuation was contained in a letter addressed by Mr. Burnet to the agents of the borrower, by whom it had been obtained. The trustees sought for no independent valuation. They made no inquiry before agreeing to the loan as to the rentals to be anticipated from the property and had no estimate of those rentals before them. It has been suggested that they were advised by their law agents that the security was sufficient. I can find no evidence of this. Mr. Meek asked whether they could lend on unfinished buildings, and received the answer that they could and that such loans were common. I see no reason to doubt that this answer was correct. If the buildings in course of erection had been of the same character as those which previously existed on the same site and these had been constantly let, I do not think that the mere fact that the new buildings were unfinished would be material if due security were taken for their completion. I lay no stress, therefore, on the mere fact that they were not completed at the time of the loan. But I have said enough to shew that the erection of these warehouses was an adventure on the part of Mr. Anderson, the borrower. Whether it proved successful or not would depend entirely upon whether the business, the purposes of which they were intended to serve, took root in the locality or not. This was a pure matter of speculation. No doubt Mr. Anderson was sanguine as to its success, and he was entitled to run what risk he pleased. But the duty of the trustees was to obtain a safe investment which would afford a security for the money advanced, and not to hazard it upon a speculation. The event which happened was such as ought to have been anticipated by any person of prudence if not as a probable, at least as a possible, one. The buildings remained in great part untenanted, the rents never reaching a sufficient sum to discharge the ground annual. Anderson became insolvent and the trust fund has been lost. I cannot think that under these circumstances the defender Meek exhibited in

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this transaction the care which a person of ordinary prudence would exercise in the management of his own affairs.

The Lord President, who took the view most favourable to him in the Court below, used the following language with reference to the security taken: "The failure of the security arose from this, that the erection of buildings of the character of those which were erected in this locality—that is in the Gallowgate of Glasgow—was in itself a very great risk and an experiment and turned out to be an entirely unsuccessful experiment." The defender not only advanced money upon such a security, but he obtained no independent opinion as to the value of the property, the rental it was likely to yield, or the prospects of speedily obtaining tenants. He was content to rely exclusively on the lump valuation of the borrower's architect obtained for the purposes of the loan. To hold that a trustee who thus acted had discharged his duty and was under no liability if the security proved worthless would, I think, be highly dangerous.

But it was urged on behalf of the defender that this did not conclude the case against him inasmuch as he was protected by the clause of immunity contained in the trust deed. That clause is in the following terms: "that the said trustees shall not be answerable for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases, nor singuli in solidum, or for the intromissions of each other or of their factor, but each for his or her actual intromissions only." Such a provision, in terms identical or not distinguishable in their effect, is a common one and is to be found in many trust deeds. It does not now come before the Courts for construction for the first time. Its effect was considered with great care in the case of *Seton* v. *Dawson* (1) long before the preparation of the trust deed with which we have to deal. And it has been the subject of discussion in several cases since the date of that decision. I adopt the law as laid down by Lord Watson in this House (2), which I think is well warranted by the authorities. "It is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the

(1) 4 Court Sess. Cas. 2nd Series, 310, at p. 318.

(2) *Knox* v. *Mackinnon*, 13 App. Cas. at p. 765.

consequences of culpa lata, or gross negligence on his part, or of any conduct which is inconsistent with bona fides. I think it is equally clear that the clause will afford no protection to trustees, who from motives however laudable in themselves act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer. I agree with the opinion expressed by Lords Ivory, Gillies, and Murray in *Seton* v. *Dawson* (1) to the effect that clauses of this kind do not protect against positive breaches of duty."

It is impossible to draw any hard-and-fast line between the want of that care which a man of ordinary prudence would display in the management of his own affairs and that high degree of negligence which is termed culpa lata. But I have arrived without hesitation at the conclusion that there was culpa lata in the present case. Indeed I think that to advance money on such a security, with only such information, and under such circumstances as I have described, was a positive breach of duty on the part of the trustee towards those beneficially entitled to the trust fund.

I feel some regret at being compelled to arrive at the conclusion that the defender is liable, for I should be most unwilling to press hardly against any trustee who has acted honestly and without any improper motive. But it is the bounden duty of the Courts to enforce against trustees the obligations they have undertaken and to protect the trust funds committed to their charge.

I have already said that no order ought to be made in this case from which Mr. or Mrs. Rae can obtain any benefit. It is impossible, therefore, to ordain simpliciter that the defender should replace the lost trust fund and that the fund thus replaced should be held subject to the trusts of the marriage contract. I think the order should be as follows:—

[His Lordship then read the order as given below.]

LORD WATSON:—

My Lords, I have had an opportunity of considering the terms of the judgment which has just been delivered in which I entirely concur.

(1) 4 Court Sess. Cas. 2nd Series, 310, at p. 318.

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LORD FITZGERALD:—

My Lords, I have carefully listened to the judgment delivered by the noble and learned Lord on the woolsack, and I entirely concur in it, in fact it is in accordance with what we agreed upon at the close of the argument.

Ordered and Adjudged, *that the said interlocutors complained of in the said appeal, so far as regards the said respondents Hotson and Howie, and Robert Howie, and Hamilton Andrew Hotson, be, and the same are hereby affirmed, and the said petition and appeal dismissed this House: And it is further* Ordered and Adjudged, *that the said interlocutors complained of in the said appeal, so far as regards the said respondent John Meek, be, and the same are hereby reversed: and it is further* Ordered, *that the cause be, and the same is hereby remitted to the Court of Session in Scotland, with directions to ordain the said respondent John Meek to pay to a judicial factor, to be appointed by the Court, the sum of* £4500, *to be held by him for the trusts and purposes following: that is to say, to pay to the said John Meek the interest derived from the investment of the fund, less the necessary expenses, during the joint lives of Robert Reid Rae and Jessie Rae. In case the said Jessie Rae should survive the said Robert Reid Rae, then to transfer the said* £4500, *or the securities representing the same, to the said John Meek, but in case the said Robert Reid Rae should survive the said Jessie Rae, then to pay to the said John Meek the interest derived from the investment of the fund, less the necessary expenses, so long as the said Robert Reid Rae shall live and remain unmarried, and, upon the decease or second marriage of the said Robert Reid Rae, to hold the fund upon the trusts declared by the marriage contract; and to further ordain that, upon pay-*

ment of the afore-mentioned sum to the judicial factor, the security relating to the Gallowgate property be transferred to the respondent John Meek, at his expense, if he shall so require: and it is further Ordered, *that the said respondent John Meek do pay or cause to be paid to the appellants their expenses of process in the court below, so far as occasioned by his defence to the action: and it is further* Ordered, *that the said respondent John Meek do pay or cause to be paid to the appellants two-thirds of the costs incurred by them in respect of their appeal to this House, the said costs to be taxed in the manner usual when the appellants sue in formâ pauperis, and the amount thereof certified by the clerk of the Parliaments.*

Lords' Journals, 8th August, 1889.

Agents for the appellants: *A. Beveridge, for W. Officer, S.S.C. Edinburgh.*

Agents for the respondent Meek: *W. Robertson & Co. for J. W. & J. Mackenzie, W.S. Edinburgh.*

Agents for the respondents Hotson & Howie and others: *Murray, Hutchins, & Stirling, for Hotson & Brown, Glasgow.*

[HOUSE OF LORDS.]

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BINNIE (PAUPER) . . . . . APPELLANT;

AND

BROOM AND OTHERS. . . . . RESPONDENTS.

Trust—Management—Trustees borrowing to pay Debts—Practice—Proof—Joining Issue on Accounts—Proof at large—Non-liability of Trustees for Furniture given to Widow for Life—Maintenance of Children out of Capital.

All that the law requires from a trustee who has power to sell or borrow, is that he shall follow the dictates of ordinary prudence in adopting the one course or the other; and the question, whether he did or did not act prudently, is one of fact to be solved according to the circumstances of each case.

The defenders, or those they represented, were appointed, under a settlement, with directions to pay debts and to pay a certain portion of the free income of the settled property to the widow of the settlor for the support, education, and putting out in the world of the children; and after the youngest child (then not born) reached thirty to sell or divide the estate, which consisted of house property in Glasgow, and to make such further advances for the maintenance and education of the children as the trustees should consider expedient. The trustees entered into office in 1857, and in 1858 borrowed a large sum to pay off, inter alia, a bond debt. The trust was sequestrated in 1867, all the creditors not being paid in full. The testator's furniture was liferented by the widow; she pledged it, and it was lost to the estate. In 1886 the pursuer and other children of the testator sought to make the trustees liable for not having sold the property instead of borrowing. The Court of Session recalled the Lord Ordinary's interlocutor allowing a proof and remitted the case to a reporter to inquire. When the cause returned the Court adopted a lower valuation for sale in 1857–8 than the reporter:—

Held, reversing the interlocutor of the Court of Session (15 Court Sess. Cas. 4th Series, 417), that the pursuer was entitled to a limited proof to substantiate his averments as to the value of the property for sale when the trustees took office, and the defenders to a proof of their averments relating to the circumstances which induced the trustees to borrow on the security of the estate; but that the pursuer having joined issue, and been fully heard upon various questions of accounting before the reporter, was not entitled to reopen these questions in a proof at large:—

Held, also, affirming the judgment of the Court of Session, (*a*) that the

trustees were authorized to make payments to the widow and children, although those payments were out of capital: (*b*) that they were not liable for the loss of the value of the furniture.

APPEAL from a decision of the First Division of the Court of Session, Scotland (1), by which the defenders were assoilzied in an action brought against them as representing trustees. The appellant G. A. Binnie, was one of the children of William Binnie the testator, a builder in Glasgow. The respondents (defenders) were David Broom, sole surviving trustee, and others, representatives of trustees acting under the testator's trust disposition and settlement.

The testator died in 1857, leaving surviving his widow and five children, the oldest of whom was nine years of age. Another child (the appellant) was born after the testator's death.

The material directions in the testator's will were to pay debts, funeral expenses, expenses of executing the trust and legacies. Then to pay his widow the income of the free residue of his estate, after paying all annuities, legacies or other charges and burdens as follows—During the first three years after his death one-fourth of the free residue; during the next succeeding seven years one-third of the free income, and thereafter one-half. But in the event of his widow marrying after she became entitled to one-half, then the payment was to be restricted to one-third. The testator gave to his widow also the liferent of his furniture.

As to his children the testator directed the trustees to pay those named or any other thereafter born "in liferent" for the purpose of their education and support, during the first three years after his death one-fourth, during the next succeeding seven years one-third part, and on the elapse of ten years one-half. These provisions were to be paid until the youngest child attained thirty. Power was given to the trustees to increase the allowance to the children for their aliment and education, or for their advancement in the world. Any extra allowances beyond their respective shares were to be debited to them in an account between them and the trust. On the youngest child attaining thirty the trustees were to sell the testator's property, or in their discretion to convey the ipsa corpora of all or any part of the property to the

(1) 15 Court Sess. Cas. 4th Series, 417.

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widow in liferent and to his children also in liferent and to their respective lawful issue in fee, in payment of the shares falling due to the widow and them respectively. The testator recommended that his sons should be educated for the church, the bar, and the profession of engineering.

The trustees were appointed tutors and curators to the children, and were to receive for every necessary meeting of the trustees each a remuneration of half a guinea.

The testator's personal estate consisted of household furniture valued at 562*l.* 8*s.* 7*d*, and rent making in all a total of 1135*l.* 18*s.* 10*d.*; but the debts were much greater. The widow carried off the furniture to London, where she pledged it, and it was eventually lost to the estate.

The heritable estate consisted of house property in Argyle Street, Hope Street, and Oswald Street, Glasgow, and was burdened with bonds to the extent of 12,000*l.*

It appeared that the rents formed the whole revenue, and that practically after 1858 there was no surplus. The trustees continued to allow the widow, for the maintenance of herself and children, a large yearly sum, the total allowance to 1867 being £2652.

On November 24, 1858, the trustees borrowed on the security of the property 26,000*l.* from the Royal Bank of Scotland at bank rate (which came to an average of 5 per cent.). With this sum they paid off the bonds for 12,000*l.*, and other debts.

The interest due to the Royal Bank was allowed to accumulate, and the actual sum paid from the 24th of November, 1858, to the 25th of November, 1869, amounted to £15,221 17*s.* 6*d.* And, excepting the years 1858, 1868, 1869, 1870, the interest if it had been paid annually would have exceeded the rents.

In 1861, the trustees sold the Hope Street property for 7000*l.*

In 1867, the trust estates were sequestrated on the petition of the trustees, with concurrence of a creditor.

The trustee in bankruptcy sold the remainder of the property in 1870 for 34,900*l.*, the total thus realised for the whole heritable property being 41,900*l.* All the creditors were not paid in full.

Mrs. Binnie, the widow, married again on October 1, 1861

She became again a widow on December 25, 1865; and died in 1875.

Of the six children, four survived, and the three sons raised this action in 1886 against the trustees for an accounting, or otherwise for payment of £20,000, as lost to the trust estate by their mismanagement. They contended that the value of the testator's property in 1857 was £42,980.

The pursuers averred, inter alia, that the free residue at the testator's death, after providing for debts, amounted to £17,000; that the trustees, in place of paying off debts, as directed, by realizing portions of the estate necessary for this purpose, had wrongfully borrowed money on the security of the heritage at exorbitant rates; that they had made large payments to Mrs. Binnie, in excess not only of what was necessary for her support, but of the provisions in the settlement, and had made payments to her and the children when there was no surplus revenue; and that the trustees had applied for sequestration to secure their own discharge.

The defenders averred that the testator left no funds sufficient for the payment of debts without realizing or borrowing; that they had acted on the opinion of counsel that the trust deed necessarily implied a power to borrow; that the trust deed gave them no power of sale till the youngest child attained thirty years, and that when they attempted to sell the title was objected to, and that the only way the property could be realized was through a sequestration; that the bulk of the property was sold in 1870, when it realized a much larger sum than it would have done if sold sooner, a great commercial depression having existed for several years after the Western Bank suspended payment on the 9th of November, 1857; that by the settlement the trustees had full power to increase the allowance to the children; that no payments were made except such as were necessary for the widow and children, the latter being at the testator's death all under ten years of age, the trustees honestly believed the circumstances of the trust warranted them in making these payments; that in 1861, on the testator's widow marrying again, they compromised for £400 her claim under a post-nuptial contract to an annuity of £100, and her claim under the settlement; that this was a

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favourable compromise for the trust; and that in borrowing the money they had acted for the good of the trust estate, and in the circumstances of the case the beneficiaries had not suffered by their management.

The pursuers asked for a proof, and on February 16, 1887, the Lord Ordinary pronounced this interlocutory: "Having considered the cause, before answer, allow the parties a proof of their averments under the Evidence (Scotland) Act, 1866." The defenders reclaimed, and the First Division, 3rd March, 1887, recalled the Lord Ordinary's interlocutor and remitted the cause to Mr. Robertson, accountant, to inquire into the amount of the trust estate from the testator's death, the amount of his debts, and the yearly income and expenditure of the trust.

Mr. Robertson reported and stated that he had called for and obtained all accounts and documents, and that he had allowed both parties an opportunity of seeing the productions, and making observations thereon; that he had before him several valuations of the heritable estate, that of 1853 gave the value as £27,753, that of 1857 as £42,980, and that of 1862 (Kay and Lamine's), adding the price received for the property sold, as £36,748, and that of 1865, adding the same values, as £41,225. Mr. Robertson's opinion was in substance that taking the value of the premises at the testator's death as what they sold for in 1861 and 1870, namely, 41,900*l.*, and adding the 1135*l.* 18*s.* 10*d.* of moveable estate, the testator's estate amounted to a total of 43,035*l.* 18*s.* 10*d.* And then taking his total debts at 35,903*l.* 14*s.* 3*d.*, there was a surplus of 7132*l.* 4*s.* 7*d.* in favour of the appellant and other beneficiaries, if the trustees had sold about the time of the testator's death. He added, that any sum that might be carried out as the value of the properties as at the date of the death of the testator must necessarily be a valuation, and although so many years elapsed between the date of the death and the date of the realisation of the whole of the properties, he was of opinion that, by taking the sums realised from time to time for the different properties, no injustice is done to the pursuers or to the defenders.

The Court of Session were of opinion that the trustees had acted very imprudently; but that there was no damage, and therefore no liability.

The Court arrived at this conclusion by adopting as the value in 1857 of the real property, not the sum the property eventually realized and which had been accepted as a fair valuation by the reporter, but the sum of the valuation made in 1862, added to the sum of £7000 realized by the sale of the Hope Street property in 1861; or a total value of £36,748.

The Court considered that the value of the furniture (£562 8*s.* 7*d.*) was not lost to the trust through the fault of the trustees, therefore that value was to be deducted from the amount of the moveable estate, estimated by the reporter as £1135 18*s.* 10*d.*, making £573 10*s.* 3*d.* moveable, and £36,748 real estate; or a total in favour of the testator of £37,321 10*s.* 3*d.* On the other side of the account the Court considered that the trustees ought to have credit for the difference between the dividends paid in the sequestration in a debt account and the full amount of the debt; the debt due to the trustees' agents' account; and the sum paid by the trustees for compounding the widow's post-nuptial contract annuity, or in all, for an extra sum of £1617 7*s.* 8*d.*, which, added to the reporter's estimate of the testator's debts (£35,903 14*s.* 3*d.*), made a total sum to be credited to the trustees of £37,521 1*s.* 11*d.* The result being that there was not a surplus, but a deficiency, in the testator's estate of £199 11*s.* 8*d.*

In this view of the accounts and valuations, the Court, on the 10th of February, 1888, pronounced an interlocutor, finding that the pursuers had failed to establish that they had sustained any loss through the misconduct of the trustees represented by the defenders; and therefore assoilzied the defenders from the conclusions of the action (1).

The appellant appealed not only from the interlocutor of the 10th of February, 1888, but also from the interlocutor of the First Division, dated the 3rd of March, 1887, recalling the Lord Ordinary's judgment allowing a proof.

1889. June 20, 21. *Shaw*, and *A. S. D. Thomson*, (both of the Scotch Bar), for the appellant:—

The conduct of the trustees in borrowing was reckless and improvident. There was yearly such an accumulation of debt

(1) 15 Court Sess. Cas. 4th Series, 417.

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that the knowledge must have pressed itself on their minds that their administration must end, as it did, in ruin. A prudent man, looking at the accounts, would not have gone on speculating with the property. The valuation of 1862 misled the Court, as probably that valuation was not for a sale but for an inventory of the residuary estate for succession duty. If that valuation had been taken at its proper sum—£42,000, it would have raised the deficit of £199 to a surplus of several thousand pounds. Then the trustees had no power to break into the capital of the trust even for the aliment of the children. They were also culpable in allowing the widow to carry off the furniture. As to the debts they were overstated, and the pursuer laid numerous objections to that effect before the reporter. Should these allegations turn out well founded, the whole character of the account would be changed from a deficit into a surplus, and the acquittal of the trustees would appear to be clearly wrong.

If the trustees had applied to the Court, producing their balance sheet, the Court would not have permitted them to proceed in the manner they did. They would have ordered the property to be sold as necessary to extricate the trust: *Erskine's Trustees* v. *Wemyss* (1); *Hamilton* v. *Bennet* (2); *Campbell's Trustees* v. *Campbell* (3); *Henderson* v. *Somerville* (4); *Graham* v. *Graham's Trustees* (5). Then, in *Ker's Petition* (6), the Court refused to give power to borrow, see also *Kinloch's Petition* (7); *Ralston* v. *McIntyre's Factor* (8).

The appellant accepted the reporter's valuation, but if that is not granted to him, he asks for a proof at large.

The Lord Advocate (*Robertson*, Q.C.), and *Shiress Will*, Q.C., for the respondents:—

There was no mismanagement on the part of the trustees;

(1) 7 Court Sess. Cas. 1st Series, 594.

(2) 10 Court Sess. Cas. 1st Series, 330.

(3) 1 Court Sess. Cas. 2nd Series, 153.

(4) 3 Court Sess. Cas. 2nd Series, 1049.

(5) 13 Court Sess. Cas. 2nd Series, at p. 424.

(6) 17 Court Sess. Cas. 2nd Series, 565.

(7) 22 Court Sess. Cas. 2nd Series, 174.

(8) 10 Court Sess. Cas. 4th Series, 72.

or, assuming that there was, then there was no loss to the beneficiaries.

Previous to the Act of 1867 (30 & 31 Vict. c. 97) *Kinloch's Case* (1) decided that the Court could not and would not in the exercise of its jurisdiction give to private trustees the power to sell. All such trustees could do was to bring an action to have it declared that the deed of trust gave them such power. But here to sell would have been inconsistent with the purpose of the trust. The circumstance of a debt on an estate, unless the figures were flagrant, does not warrant a sale.

There are sufficient facts here to justify the trustees borrowing. The appellant asks for further proof, but he is precluded from that. He allowed the remit to go to the reporter; whereas he ought to have told the Court of Session he wished to establish his facts (2).

As to the furniture, the life-rentrix was entitled to its possession, and there is no way the trustees could—on the suggestion of its being pledged—get it back.

With regard to the payment to the widow and children, it was immaterial whether it was paid out of income or capital, the deed contained enough to protect the trustees; also the pursuers were the recipients and cannot now challenge it.

At the date of the testator's death, 1857, it was demonstrative, owing to the failure of the Western Bank, that prudent trustees would have held over the property in the hope of better times.

They also commented on *Raeburn's Trustees* (3).

Shaw replied.

LORD HERSCHELL:—

My Lords, I have had an opportunity of perusing the opinion which my noble and learned friend (Lord Watson) is about to deliver, and I entirely concur in it.

(1) 22 Court Sess. Cas. 2nd Series, 174.

(2) See interlocutor in *Carron Co.* v. *Stainton's Trustees*, 19 Court Sess. Cas. 2nd Series, at p. 936; *North British Bank* v. *Collins*, 1 Macq. 369.

(3) 15 Court Sess. Cas. 4th Series, 740.

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LORD WATSON :—

My Lords, I have come, with much regret, to the conclusion that, notwithstanding the inquiry which has already been made in the Court below, the facts of this case have not been sufficiently investigated to enable your Lordships to dispose of it by a final judgment.

The action was brought, in November, 1886, by the appellant and two others, sons of William Binnie, builder in Glasgow, who died in October, 1857, as beneficiaries under their father's settlement, against the respondents, who are the trustees, or representatives of trustees, who accepted office and administered the trust created by that deed. The trust estate chiefly consisted of house property in Glasgow, burdened with an heritable debt of £12,000. The truster left a large amount of personal debt; and the trustees borrowed £26,000 upon the security of the real estate, with which they paid the charge of £12,000 and other debts, leaving a considerable balance unpaid. It is sufficient to say here that the results of their administration, whether prudent or not, were unfortunate; and that in June, 1867, the trustees applied for a sequestration of the estate, which was accordingly realized and distributed under the provisions of the Bankruptcy Acts, some of the creditors receiving less than 20*s.* in the pound.

The pursuers averred that, in 1857 and 1858, after the trustees entered upon office, the heritable property was worth, and could have been sold for, £42,980—a sum sufficient to pay the whole debt, and leave a substantial margin for the beneficiaries; and that the trustees exceeded their powers, and violated their duty, in borrowing money on the security of the property instead of selling it. The defenders denied these allegations, and stated a variety of circumstances, which it is unnecessary to detail, in explanation and justification of the course of management which was pursued by the trustees.

The Lord Ordinary (McLaren) allowed the parties a proof of their averments; but his interlocutor was recalled by their Lordships of the First Division, who remitted to an accountant, "to inquire into the amount of the trust estate from the date of the truster's death, the debts due by the truster and paid by the trustees, and the yearly income and expenditure of the trust, and

to report." The course thus adopted in order to prepare the case for judgment was, in my opinion, an expedient one; because a remit to an accountant of skill is a much more satisfactory method of investigating the details of trust management, and its pecuniary results, than a general proof. At the same time a remit of that kind does not deprive the parties of their right to prove, in the ordinary way, disputed facts which are not proper matters of accounting.

The report, when completed, disclosed the following facts, upon which the controversy between the parties came to depend in the Court below:—(1.) That the heritable property was valued, as for a loan, part of it in May, before the truster's death, and part in October, 1857, after that event, the sum of the two valuations being £42,980. (2.) That in the year 1862, after the sale of one tenement in November, 1861, at the price of £7000, the remainder was valued, with a view to sale, at £29,748; and (3.) That the entire property was sold in parcels between November, 1861, and March, 1870, the prices realised amounting in cumulo to £41,900. The reporter also stated that, "as any sum that may be arrived at as the value of the property at the date of the truster's death, must necessarily be a valuation," there would in his opinion be no injustice done to either party if £41,900 were taken to represent its value at that date.

When the case was heard upon the report, the pursuers impeached it, without lodging a note of objections according to the usual practice, and insisted that they were entitled to a proof of their whole averments on record. They offered, however, to waive their demand for proof, and to take the report as the evidence in the case, upon condition of the Court accepting as conclusive the accountant's view with regard to the value of the real property. Both alternatives were very properly rejected by the Court. The first of them was again pressed by the appellant at the bar of the House; but it is clear that a party who has joined issue with his opponents, and has been fully heard before the reporter upon proper questions of accounting, cannot be permitted to reopen these questions in a proof at large.

Neither of the parties having moved for a limited proof, the First Division proceeded to dispose finally of the case upon the

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basis of the report. Their Lordships assoilzied the defenders upon the ground as expressed in their interlocutor, "that the pursuers have failed to prove that they have sustained any loss through the misconduct of the trustees." It appears from the judgments delivered at the advising of the cause, that their Lordships were of opinion that the trustees had been guilty of misconduct, which would have involved the defenders in liability, had not the pursuers injuria been sine damno. But their Lordships, differing therein from the reporter, estimated the selling value of the heritable property in 1857–8 at £36,748, adopting the valuation of 1862, plus the sum received for the part sold in 1861. To that estimate they added £573, as the amount of the personal estate, making the total charge against the trustees £37,321. On the other side of the account, their Lordships held that the trustees were entitled to credit for debts and charges paid by them, or by the trustee in the sequestration, to the amount in all of £37,521; the result being that had the real estate been sold at the time when the appellant alleges it ought to have been, the liabilities of the trust would have exceeded its assets by £200, nothing whatever being left for the beneficiaries.

Were it now necessary to determine the market value of the property, at the commencement of the trust, with no other assistance than the information contained in the report, I should hesitate to disagree with the conclusion which was arrived at in the Court below. I certainly do not think that the prices which it fetched when sold in lots, between the years 1861 and 1870, can fairly be taken to represent its selling value in the end of 1857; and experience leads me to doubt whether a valuation obtained in 1857 solely for the purpose of a loan, can be safely relied on as an approximate estimate of its value for immediate sale. Besides, I do not find anything in the report tending to the inference that the market-value of such properties was higher in 1857–1858 than in 1862. But the appellant has now insisted before us for a proof of his averments touching the value of the subjects for sale at the time when the trustees entered upon office and could have sold; and seeing that he has never renounced probation, or agreed to accept the report as

containing all the evidence which he desires to adduce, I cannot advise your Lordships that he ought not to have the opportunity which he asks for. He may, at this distance of time, have some difficulty in bringing forward evidence of market-value in 1857 of a more direct and less speculative character than that which is to be found in the report; but that circumstance cannot affect his right to make the attempt. The respondents, in the event of the appellant being allowed a proof, expressed their desire to have an opportunity of instructing their averments bearing on the motives which induced the trustees to borrow, and I think their request ought to be conceded.

Besides the main question regarding the value of the real estate, two items in the accounting were fully discussed in the course of the argument. The appellant maintained that the Court ought to have charged the trustees with £562, being the estimated value in 1857 of furniture liferented by his mother, who died in 1875. I am of opinion, for the reasons assigned in the judgment of the Lord President (Inglis), that the charge was rightly disallowed. Again, the respondents argued that the trustees ought to have had credit for the sum of £2652, which represents payments made to the widow for the maintenance of herself and the children who lived with her until her re-marriage in 1861, and payments made between 1857 and 1867 towards the maintenance and education of beneficiaries who were not living with their mother. These sums were, no doubt, in excess of the free income of the trust; but the trustees had, under the trust settlement, a power of advancement out of capital, sufficient, in my opinion, to validate such payments in any question with the appellant and others beneficially interested. The estimate of the house property which the Court below adopted, made it unnecessary to decide as to this item; but, if it were added to the sums with which the trustees have been credited, the balance would still be against them, if the appellant's statements with regard to the value of the property were established.

I should have contented myself with making these observations, which are sufficient for the disposal of this appeal, had it not been that, in the Court below, the learned judges have expressed themselves with regard to the conduct of these trustees,

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and of trustees generally, in terms to which I cannot assent. The Lord President, with the concurrence of Lords Mure and Adam, said (1): "The conduct of trustees in borrowing money under any circumstances is highly imprudent. If it turns out to be a mistake, it subjects the trustees to personal liability." I do not know whether, by these words, the Lord President intended to lay down a principle of law, or a proposition of fact; the result in either aspect might prove very unfortunate so far as the interests of beneficiaries are concerned. A trustee would incur unnecessary risk (which his duty in no case compels him to do) if he borrowed in order to pay debts prudently, and with a reasonable prospect of securing a considerable reversion to the beneficaries; and he would be justified for his own protection in at once selling, to the destruction of their interests, although no prudent person (himself included) thought it the better course to pursue. But there is really no such rule in existence. All that the law requires from a trustee who has power to sell or borrow is, that he shall follow the dictates of ordinary prudence in adopting the one course or the other; and the question whether he did or did not act prudently is one of fact, which must be solved according to the circumstances of each case.

Looking to the terms of Mr. Binnie's trust deed, I see no reason to doubt that the trustees had implied power either to sell or borrow, for the purpose of paying debts, if the exigencies of the trust required it; and I am consequently of opinion that the conduct of the trustees, in borrowing and not selling, raises a question of prudent management only. If it were not for the unbending rule which they laid down as to the imprudence of borrowing in any circumstances, there might be difficulty in reconciling the views which the learned judges took of the conduct of these trustees, with the considerations which led them to fix the value of the property at £36,748. These were, that house property in Glasgow became, in the end of 1857, greatly depreciated in value, and in many cases unsaleable. In that state of the market I cannot help thinking that prudent men would have been most reluctant to sell, if that step could by any possibility be avoided. I have thought it proper to make these remarks, with

(1) 15 Court Sess. Cas. 4th Series, 423.

no desire to prejudge any question which may arise when the facts are ascertained, but in order to guard against its being supposed that in my opinion the appellant will be necessarily entitled to prevail in this action, if he succeeds in proving the value which he has alleged.

I am accordingly of opinion that the interlocutors appealed from, in so far as these concern the appellant, ought to be reversed, and the cause remitted to the Court of Session, with directions to allow the appellant a proof of his averments with respect to the value of the heritable property, and to the respondents a proof of their averments relating to the circumstances which induced the trustees to borrow on its security. If the appellant had asked in the Court below for the restricted proof which has been allowed him here, I see no reason whatever for supposing, either that the respondents would have resisted the motion, or that the Court would have hesitated to grant it: and I am therefore of opinion (seeing that the appellant sues in formâ pauperis) that there ought to be no costs of this appeal.

LORD FITZGERALD concurred.

Ordered, that the interlocutors appealed from in so far as the same concern the appellant be reversed: and that the cause be remitted to the Court of Session with directions to allow the appellant a proof of his averments with respect to the value of the heritable property, and to the respondents a proof of their averments relating to the circumstances which induced the trustees to borrow on its security.

Lords' Journals, 8th August, 1889.

Agents for the appellant: *Scoles & Co., for Marcus J. Brown, S.S.C., Edinburgh.*

Agents for the respondents: *Bircham & Co., for Henry & Scott, S.S.C., Edinburgh.*

[PRIVY COUNCIL.]

J. C.*
1889
July 11, 12, 25.

THE CORPORATION OF THE TOWN OF ST. JOHN'S AND ANOTHER . . . } APPELLANTS;

AND

THE CENTRAL VERMONT RAILWAY COMPANY . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Quebec—Quebec Act, 40 *Vict. c.* 60, *ss.* 323, 326, *and* 327—*Taxable Property of Railway—Practice—Special Leave.*

Held, that by the true construction of sects. 323, 326, and 327 of Quebec "Town Corporation General Clauses Act, 1876" (40 Vict. c. 60), no part of a railway is made taxable property, except the land as land occupied by the road, the bridges or other superstructures thereon being excluded.

Where special leave to appeal is granted on the ground that the appellant desires to raise a particular question of great and general importance, he cannot be permitted at the hearing to say that no such question arises, and to argue that the case turns upon a question of fact, on which the Court below was in error. Accordingly the appellant town corporation was precluded from contending that, as matter of fact, the assessment in question had been confined to the land occupied by the road.

APPEAL by special leave from a decree of the Supreme Court (June 20, 1887), reversing decrees of the Superior Court (March 10, 1885) and the Court of Queen's Bench of the Province of Quebec (March 27, 1886), and granting an injunction restraining the appellants from levying certain taxes against the respondent.

The question arose upon a petition by the respondent under the Injunction Act, 41 Vict. c. 14 (Quebec), claiming an injunction to restrain the appellants from enforcing against the respondent's property a distress warrant issued by the appellants in respect of alleged arrears of municipal taxes, on the ground that the assessments in respect of which the warrant was issued were invalid.

* *Present:*—LORD WATSON, LORD BRAMWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

The facts are stated in the judgment of their Lordships.

Jeune, Q.C., and *Gore*, for the appellants.

Sir *Horace Davey*, Q.C., *John S. Hall*, Q.C. (Canada), and *Fullarton*, for the respondent.

[*Sheo Singh Rai* v. *Mussumut Dakho* (1) was referred to upon the point whether the appellants should be allowed to contend that on the evidence no such question arose as that in reference to which as a matter of great and general importance special leave to appeal had been granted.]

1889
July 25.

The judgment of their Lordships was delivered by

LORD WATSON:—

By the Quebec Act, 44 Vict. c. 62, which amends and consolidates previous statutes relating to the incorporation of the town of St. John's, the appellant corporation is (sect. 86) authorized to levy annually on all lands, town lots, and parts of town lots within the municipality, with the buildings and erections thereon, a sum not exceeding one half cent in the dollar on their whole real value as entered on the assessment roll of the town. Sect. 98 of the Act incorporates certain sections of the "Town Corporation General Clauses Act, 1876" (Statutes of Quebec, 40 Vict. c. 60), including the three following clauses, upon the construction of which this appeal mainly depends:—

"323. It shall be the duty of the valuators in office to make annually, at the time and in the manner ordered by the council, the valuation of the taxable property of the municipality, according to the real value."

"326. Every iron railway company or wooden railway company, other than those mentioned in the preceding section, and possessing real estate in the municipality, shall transmit to the office of the council, in the month of May in each year, a return shewing the actual value of their real estate in the municipality other than the road, and also the actual value of the land occupied by the road, estimated according to the average value of land in the locality.

(1) Law Rep. 5 Ind. Ap. 87.

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"Such return must be communicated to the valuators by the secretary-treasurer in due time."

"327. The valuators, in making the valuation of the taxable property in the municipality, shall value the real estate of such company according to the value specified in the return given by the company.

"If such return has not been transmitted in the time prescribed, the valuation of all the immoveable property belonging to the company shall be made in the same manner as that of any other ratepayer."

The Central Vermont Railway Company, the respondent in this appeal, is the owner of a line of iron railway, part of which is within the municipal limits of the town of St. John's. The municipal boundary extends to the medium filum of the Richelieu, a navigable river, over which the respondent's railway is carried by a wooden bridge, some of its piers having their foundations in the solum of the river, which, in so far as the interests of navigation are concerned, is subject to the legislative authority of the Dominion. The respondent company did not, in any of the years from 1880 to 1884, both inclusive, make the return to the council which is prescribed by sect. 326 of the General Act; and, in each of these years its real estate within the muncipality was valued for the purposes of the assessment roll, by the official valuators of the town, in terms of sect. 327.

For the year 1884 the entry made in the roll was in these terms:—

La Compagnie de Chemin de Fer de Central Vermont, étant pour la partie de son pont en bois dans les limits de la ville	$12,000

In each of the four years following the valuation of the respondent's real estate within the boundaries of the town, as entered in the roll, included these two items:—

Railway tracks from East Longneuil Street to bridge	$10,000
Part of railway bridge within limits of town of St. John's	$10,000

The appellant corporation annually imposed municipal assess-

ments upon the bases of these valuations, no part of which has been paid by the respondent. In consequence of such default, a distress warrant was issued by the corporation, empowering a bailiff to distrain for the amount of the assessments in arrear, with interest.

The respondent company, on the 18th of December, 1884, made application to the Superior Court of the Province of Quebec for a writ of injunction ordering the corporation to stay proceedings upon the warrant until further orders of the Court; and on the 19th of December a writ of injunction was issued by Chagnon, J., upon the applicants giving security in terms of the Quebec Act in that behalf of 1878. On the 10th of January, 1885, the corporation filed a petition to quash the injunction, and after a variety of procedure, which it is unnecessary to detail, Chagnon, J., on the 10th of March, 1885, gave judgment annulling the writ of injunction, with costs. On an appeal by the present respondent, the decision of the Superior Court was unanimously affirmed by the Court of Queen's Bench for the Province, consisting of Dorion, C.J., with Monk, Ramsay, Cross, and Baby, JJ.

The case was then carried by appeal to the Supreme Court of Canada, who, on the 20th of June, 1887, reversed, by a majority of four against two, the judgments of both Courts below, found that the warrant and all proceedings following thereon were illegal and null, and ordered that the same should be set aside, and that a writ of injunction do issue out of the Superior Court for Lower Canada, enjoining the corporation to desist from all proceedings to enforce the warrant.

Chief Justice Ritchie, with whose opinion Strong, Henry, and Gwynne, JJ., substantially agreed, stated the real controversy between the parties to be "whether or not anything more of the land on which the superstructure of the railroad is placed can be assessed in addition to the land itself;" and on the construction of the clauses of the General Act already quoted, the learned Chief Justice was of opinion that "the Legislature has carefully protected railways from any local assessment beyond the mere value of the land, apart from, and independent of, the roadway with its superstructure."

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The two Judges of the minority were Fournier and Taschereau, JJ. Fournier, J., does not, in his elaborate opinion, deal with the point which was said by the Chief Justice to constitute the real matter of controversy. Taschereau, J., on the contrary, states that the present respondent attacked the warrant of distress on two grounds, the one affecting the whole assessments, and the other confined to the assessment for the year 1880. The learned Judge said, "The first, which applies to all the taxes claimed on the part of the appellants' road on terra firma, is that the land only occupied by the road is taxable, and not the road bed itself." His reasons for coming to a different conclusion from that of the majority are thus expressed: "We have been referred to the case of the *Great Western* v. *Rouse* (1), in which it was held that only the land occupied by the railway, and not the superstructure, is taxable. But this case has no application here, because the statute of 1853, Upper Canada Assessment Act, 16 Vict., c. 182, s. 21, does not provide, as the Quebec statute I have cited does, that if the company fails to make a return to the council the valuation of all its immoveable property shall be made as that of any other ratepayer."

Her Majesty, in accordance with the advice of this Board, was pleased, by Order in Council dated December 17, 1887, to allow the present appellants to enter and prosecute an appeal against the judgment of the Supreme Court. In the petition for special leave, which is recited in the order, the appellants set forth correctly the grounds upon which the learned Chief Justice, and the judges who concurred with him, decided in favour of the present respondent, and then submitted "that if the judgment of the Supreme Court, contrary to the view of both Courts in the province and to that of the two French judges in the Supreme Court, is correct, the power of taxation of the municipalities in the province of Quebec is greatly limited, and that whether it is by law so limited is a question of great and general importance."

Their Lordships would not have made any reference to these initial proceedings, had it not been that, at the hearing of the appeal, their time was chiefly occupied by an endeavour on the part of the appellant corporation to argue that, as matter of fact,

(1) 15 U. C. Q. B. 168.

they had not, in any of the yearly rolls upon which these assessments were made, valued aught beyond the land occupied by the railway, and that they did not desire to include, and had not included, the bridge or other superstructures in the estimate. Their Lordships purposely abstain from laying down any rule as to the points which an appellant may competently raise under an appeal by leave from the Supreme Court of Canada. That must depend upon the special circumstances of each case. But it must be understood that parties who get such leave, upon the distinct representation that they desire to raise a particular question of law of great and general importance, cannot be permitted, at the hearing of the appeal, to change front and say that no such question arises, and to argue that the case turns upon a question of fact which the Supreme Court has wrongly assumed or decided. If the appellant corporation, in petitioning for the exercise of Her Majesty's prerogative, had stated the same case which they attempted to present in argument, it is almost matter of certainty that leave to appeal would have been refused.

Upon the construction of the Municipal Acts, their Lordships entirely concur in the view taken by Chief Justice Ritchie. Sect. 323 of the General Act imposes upon the valuators appointed by the council the duty of making a valuation of the "taxable property of the municipality;" and by the terms of sect. 326 no part of a railway is made taxable property, except the land as land, occupied by the road. In their Lordships' opinion the enactment of sect. 327, to the effect that, when the company make no return, the valuation of all their immoveable property shall be made in the same manner as that of any other ratepayer, refers to their immoveable property already declared to be taxable, and simply amounts to a direction that the value of such taxable estate shall be estimated by the town's valuators instead of the company itself.

The judgment of the Supreme Court ought therefore to be affirmed; and their Lordships will humbly advise Her Majesty to that effect. The appellants must pay the costs of this appeal.

Solicitors for the appellants; *Bompas, Bischoff, Dodgson, & Coxe.*
Solicitors for the respondent: *Simpson & Co.*

[PRIVY COUNCIL.]

J. C.*
1889
May 28;
July 27.

MUTUAL PROVIDENT LAND INVESTING AND BUILDING SOCIETY, LIMITED . } DEFENDANTS;

AND

MACMILLAN AND WIFE . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Act, No. 25, s. 1—Declaration by Attorney.

By New South Wales Act, No. 25, s. 1, a declaration made by an attorney that he has no notice of the revocation of his power by death or otherwise is conclusive proof of non-revocation, when made to a bonâ fide purchaser for valuable consideration without notice of any such revocation.

Held, that a general verdict against such purchaser in an action to recover the property was justified by evidence to the effect that such purchaser had cause to suspect and did suspect the truth of such declaration; and that an order refusing a new trial must be affirmed.

APPEAL from an order of the Supreme Court (Dec. 12, 1887). The facts are stated in the judgment of their Lordships.

Byrne, Q.C., and *Coward*, for the appellant, referred to *Northern Counties of England Fire Insurance Company* v. *Whipp* (1); Conveyancing Act of 1882, ss. 8 and 9, as similar in policy to the local Act in regard to not putting an intending purchaser on a roving inquiry: *Lloyd* v. *Banks* (2).

F. Thompson, for the respondents, referred to *Parker* v. *Smith* (3).

Byrne, Q.C., replied.

* *Present*:—LORD WATSON, LORD BRAMWELL, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) 26 Ch. D. 482. (2) Law Rep. 3 Ch. Ap. 488.
(3) 16 East, 382.

July 27. The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

Their Lordships are of opinion that the judgment and order of the Supreme Court discharging the rule nisi for a new trial, with costs, ought to be affirmed.

The action was brought by James Laker Macmillan and Lucy Jane Macmillan, his wife, to recover certain freehold property which at time of their marriage belonged to the wife. It was proved that on the 24th of March, 1882, Mrs. Macmillan, then Lucy Jane Marsh, spinster, executed a power of attorney under seal by which she appointed Hamilton White to be her attorney, and thereby authorized him, amongst other things, in her name and on her behalf absolutely to sell all the messuages, lands, and tenements to which she then was or should become seised, possessed, or entitled in law or in equity, and she thereby declared that the said power of attorney should continue in force until notice of her death or the revocation of the power of attorney should have been received by her attorney. The defendants claimed to have derived title under a conveyance of the property to William Joseph Trickett, executed on the 31st of October, 1884. The deed purported to be a conveyance from (amongst others) Lucy Jane Marsh, spinster, therein described as of Sydney, but then absent therefrom. The deed was executed by the said Hamilton White as her attorney, and he was also made a party to the deed and covenanted to produce the power of attorney. He also made a statutory declaration which was indorsed on the conveyance that he had not received any notice of the revocation of the power of attorney by death or otherwise.

Before the execution of the deed, namely, on the 1st of October, 1884, Miss Marsh was married to James Laker Macmillan, the co-plaintiff, and had therefore ceased to be Lucy Jane Marsh, spinster, and was not competent to convey the property, of which an interest passed to her husband upon her marriage.

Mrs. Macmillan was called as a witness, and stated that before she left New South Wales to be married she distinctly told White that she revoked the power of attorney, and that he then knew she was to be married in three weeks.

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The case was tried before Mr. Justice Innes and a jury, and one of the questions put to the jury was, "Had Miss Marsh, now Mrs. Macmillan, revoked the power of attorney before the conveyance to Trickett?" to which the jury answered "Yes." The question and answer evidently related to the parol revocation spoken to by Mrs. Macmillan. By the 17 Vict., No. 25, New South Wales, intituled an Act to give greater effect to Powers of Attorney, it was enacted as follows:—

1. "Whenever the person who may have executed or shall hereafter execute any power of attorney (whether such person were or be at the time within the colony or not) shall have declared or shall declare therein that such power shall continue in force until notice of his death or of the revocation of such power shall have been received by the attorneys named therein then and in every such case such power shall operate accordingly and every act hereafter done performed or submitted to by the said attorneys within the scope of the powers and authority conferred upon them after such death or revocation as aforesaid and before notice thereof shall have been received shall be as effectual in all respects as if such death or revocation had not happened or been made and a solemn declaration made by any such attorney that he has not received any notice of the revocation of such power of attorney by death or otherwise shall if made immediately before or after executing any such conveyance or other instrument as aforesaid or doing performing or submitting to any such act as aforesaid be taken to be conclusive proof of such non-revocation at the time of such execution in favour of any person who shall bonâ fide and for valuable consideration and without notice to himself of any such revocation have accepted any such conveyance or other instrument from or dealt with such attorney in the name of his principal."

The learned judge also left two other questions to the jury, namely:—

2nd. Did Mr. Trickett accept the conveyance to himself bonâ fide, and for valuable consideration?

3rd. Was the female plaintiff married to the male plaintiff on the 1st of October, 1884?

The following is the judge's note of what took place:—

"Summed-up. Leave three questions.

"Jury retire at 11.5.

"Rogers requiring me to tell them formally that they are not bound to answer the questions, and that they may find generally for plaintiffs or defendants. I recall them and tell them so formally. In five minutes they come in with the first question only answered, but saying they meant to say yes to the third, and that out of regard to my suggesting that they should not answer the second they had declined to do so, and they find for the plaintiffs.

"I therefore tell them that, so far from having suggested that they should not answer the second question, I had requested them to do so, and that I feared they had involved the parties in protracted litigation. They said they were prepared to answer the question, but had understood me to say that they were not to do so.

"I send them back to reconsider their verdict, and decline to accede to Rogers' request to have the verdict for the plaintiffs recorded yet.

"And after a few minutes I recall them, and explain fully to them the position, again telling them they were not bound to answer the questions, and they might still find as they pleased for plaintiffs or defendants.

"The jury, after ten minutes, return a verdict for the plaintiffs, and answer the questions.

"Verdict for plaintiffs."

The answer to the 2nd question was, "We believe Mr. Trickett from his conversations with Mr. Manning, and from what he knew of Mr. White, should have made inquiries as to the validity of the power of attorney before purchasing."

And to the third, "Yes."

In his reasons for his judgment on the motion for a new trial, Mr. Justice Faucett remarked that, in his opinion, the statute applied only to cases where no notice of revocation has been received either by the attorney or by the purchaser, and Mr. Justice Innes, who tried the case, stated that it was clear that

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White, the attorney, had direct notice of the revocation, and that, in his opinion, the Colonial statute applied only to cases where no notice of revocation had been received either by the attorney or by the purchaser. Their Lordships are unable to concur in that construction of the statute. It appears to them that the sole object of the statutory declaration is to protect a bonâ fide purchaser, without notice, against the fraud of the attorney; so that the declaration made by White that he had no notice of the revocation of the power by death or otherwise would have been conclusive proof of non-revocation, if Trickett had been a bonâ fide purchaser for valuable consideration, without notice of any such revocation.

Their Honours, however, appear to have been of opinion that the evidence was sufficient to justify the general verdict found by the jury. There was evidence before them that, at one time or other, Trickett was informed by Manning that he did not believe White and would not have taken his declaration. Trickett does not dispute that the communication was made to him, but he says that it was after, whereas Manning says it was before, the transaction was completed. If the jury believed Manning in preference to Trickett, as to the time when the information was given, their Lordships cannot say that they were not entitled to infer from the evidence that Trickett, at the time of the purchase, had cause to suspect and did suspect the truthfulness of White's declaration. The fact that the jury found as they did upon the second question is not inconsistent with their general verdict, considering that they were expressly told by the presiding judge that they were not bound to answer it, and would naturally be unwilling to stigmatise the conduct of Trickett in plain terms.

In these circumstances, their Lordships are not prepared to say that the lower Court was wrong in refusing to grant a new trial. They will, therefore, humbly advise Her Majesty that the order of the Supreme Court be affirmed.

The appellants must pay the costs of this appeal.

Solicitors for appellants: *Hill, Son, & Rickards.*
Solicitors for respondents: *Field, Roscoe, & Co.*

[PRIVY COUNCIL.]

STRANG, STEEL & CO. . . . . DEFENDANTS;

AND

A. SCOTT & CO. . . . . PLAINTIFFS.

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Jan. 31; Feb. 1; Aug. 1.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

General Average—Jettison—Right to Contribution—Remedies—Lien on Goods salved.

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The right of contribution in respect of jettisoned cargo is based on the danger to ship and cargo requiring sacrifice to which all must contribute. Such right does not belong to the wrongdoers whose acts have led to the jettison, or to those who are legally responsible for them.

Where a ship is stranded through the negligence of her master, and thereby ship and cargo are placed in a position of such imminent danger as to make it prudent and necessary to jettison part of the cargo in order to save the remainder and the ship:—

Held, that innocent owners of the jettisoned cargo are entitled to general average; *secus* with regard to the owners of the ship unless their ordinary relations to the shippers have been varied by contract.

The rules of maritime law relating to the rights and remedies resulting from a proper case of jettison are:—

(1.) Each owner of jettisoned goods becomes a creditor of ship and cargo saved.

(2.) He has a direct claim against each of the owners of ship and cargo for a pro ratâ contribution towards his indemnity; which he can recover (*a*) by direct action; (*b*) by enforcing through the ship master, who is his agent for that purpose, a lien on each parcel of goods salved to answer its proportionate liability.

APPEAL from a decree of the recorder (Aug. 15, 1887) in favour of the respondents for Rs.1,592. 11 paid by them to the appellants under protest to obtain the delivery of the respondents' goods.

The facts are stated in the judgment of their Lordships.

The recorder found as a fact that the jettison was occasioned by the negligence of the master. He held that in consequence no claim for general average contribution could be enforced, and that it was unreasonable in any case for the appellants to insist

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on having the assessment of the general average contribution paid to them so as to be under their sole control.

Finlay, Q.C., and *Barnes*, Q.C., for the appellants, contended that the respondents, as owners of goods salved by means of the jettison, were liable to contribute to general average for the cargo jettisoned, and the other general average expenses incurred. Even if the jettison had been, as alleged, occasioned by the master's negligence in the navigation of the ship, that did not affect the right of the innocent owners of the goods jettisoned to indemnity, or relieve the owners of the goods salved from their liability. Under such circumstances it is the duty of the master to collect the general average contributions before he parts with the goods, and in such case he acts not merely as agent for the shipowners, but also as agent for the shippers. Whether the contribution is for the benefit of ship or cargo is immaterial, in either case it is the duty of the master to collect it and to assert a lien on goods salved in respect of it. Reference was made to *Simonds* v. *White* (1); *Crooks & Co.* v. *Allan* (2); *Schloss* v. *Heriot* (3); *Hallett* v. *Bousfield* (4); *Dobson* v. *Wilson* (5); *Burton* v. *English* (6), which lays down the principle on which general average is taken: *The Cargo ex Laertes* (7); *The Glenfruin* (8).

The bills of lading under which the respondents' goods were carried exempted the owners of the vessel from all liability in respect of the negligence of the master in navigating the vessel. Consequently the negligence of the master did not deprive the owners of the vessel of their right of lien on the cargo for general average, sacrifices and losses incurred. They were accordingly entitled to demand a deposit of 5 per cent. on the value of the goods, and to refuse to release them unless such deposit were made. See Lowndes on General Average (4th ed.), 332; Abbott on Shipping, (12th ed.), 532, citing the Digest as to the position of the master according to Civil Law; Parsons on Marine Insurance, c. v. s. 10, vol. ii., p. 285. The claim to general average

(1) 2 B. & C. 805, 811.
(2) 5 Q. B. D. 38, 41.
(3) 32 L. J. (C.P.) 211; S. C., 14 C. B. (N.S.) 59.
(4) 18 Ves. 187.
(5) 3 Camp. 480.
(6) 12 Q. B. D. 218.
(7) 12 P. D. 187.
(8) 10 P. D. 103.

does not depend upon exceptions in bills of lading, it rests on the general law, springing out of the existence of a common duty of sacrifice and the resulting duty of contribution by those who are benefited by the sacrifice.

Bigham, Q.C., and *Fitzgerald*, for the respondents, contended that the grounding of the vessel was caused by the negligence and misconduct of the master. He and the shipowners were liable for the losses thence resulting. When the master jettisoned cargo, he was the agent in doing so of the shipowners, and not of all concerned. They must bear the loss by the jettison, for under the circumstances of the case the owners of cargo were exempted, and the jettison did not give rise to a general average contribution. The sacrifice was not for the benefit of all, but for the benefit of the owners in consequence of the wrongful act of the master, see 2 Parsons on Marine Insurance, pp. 217, 225; Abbott on Shipping, ed. 1881, p. 499. If goods are jettisoned by reason of their having been brought into extra peril by the owners or master, then the goods salved are under no liability to contribute. See Parsons on Marine Insurance, vol. ii., p. 285; Law of Shipping, vol. i., p. 211; and the cases in reference to deck goods jettisoned, Ware's Admiralty Decisions (District of Maine), p. 326, *The Paragon*. The contract evidenced by the bill of lading and the exceptions has nothing to do with the question of general average. The case must be disentangled from the clauses in the bill of lading. See *Crooks* v. *Allen* (1); *Wright* v. *Marwood* (2); *The Norway* (3); *Huth & Co.* v. *Lamport* (4); *Ashmole* v. *Wainwright* (5); *The Ettrick* (6).

Barnes, Q.C., replied.

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Aug. 1.

The judgment of their Lordships was delivered by

LORD WATSON:—

The steamship *Abington*, on her way from London to Rangoon, with a general cargo, ran aground on the Baragua Flats in the

(1) 5 Q. B. D. 38.
(2) 7 Q. B. D. 62.
(3) Br. & Lush. 377.
(4) 16 Q. B. D. 442.
(5) 2 Q. B. 837.
(6) 6 P. D. 127, 135.

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Gulf of Martaban. Part of the cargo was thrown overboard in order to lighten the vessel, which was got off by that means, and was enabled to reach her destination in safety on the 19th of October, 1886. On the day of her arrival in the port of Rangoon, the appellants, Strang, Steel & Co., local agents for the ship, intimated to the respondents, A. Scott & Co., and other consignees of the cargo then on board, that a deposit of one per cent. upon the value of their goods would be required before delivery "against probable average claim;" and on the following day they made a further intimation that the amount of deposit required would be 5 per cent. A correspondence ensued, in the course of which the respondents made various tenders, all of which were declined; and on the 25th of October, six days after the arrival of the *Abington*, they paid the required deposit, amounting to Rs.1,592. 11, under protest, and obtained delivery of their goods.

The respondents, on the 27th of October, 1886, instituted the present suit in the Court of the Recorder of Rangoon for recovery of their deposit, and for damages on account of the detention of their goods, upon the allegation that they had before payment made a tender entitling them to delivery. Upon the same day on which their plaint was filed the respondents applied to the Court, under sect. 492 of the Civil Code, for an injunction to restrain the appellants, Strang, Steel & Co., from remitting to England, or removing from the jurisdiction of the Court, the deposit paid to them on the 25th of October. These appellants judicially undertook to retain the amount claimed in their own possession, subject to the orders of the Court, without the issue of a formal injunction, and no further proceedings have been taken in that application.

On the 5th of February, 1887, the respondents were allowed to add to their original ground of action an allegation to the effect that they were not liable to contribute for general average on account of either ship or cargo, because the grounding of the *Abington* and the consequent jettison of part of the cargo, were due to the default, negligence, and misconduct of her master. Upon the pleadings thus amended, the case was twice tried before the recorder, who ultimately, on the 15th of August, 1887, gave

the respondents decree for Rs.1,592. 11, and for Rs.200, in name of damages, with costs of suit. The learned judge found, as matter of fact, that the stranding of the ship upon the Baragua Flats was occasioned by the negligent navigation of the master; and he held, as matter of law, that no claim for general average arises to the owners of cargo jettisoned when the peril which necessitated jettison is induced by the fault of the ship. Whilst resting his decision upon that ground, the learned judge indicated that, in his opinion, the respondents had made a tender entitling them to demand immediate delivery of their goods, before they paid the deposit to the appellants.

In the course of the argument upon this appeal, three separate points were raised and fully discussed. The appellants argued, (1) that innocent owners of cargo sacrificed for the common good are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the ship-master's fault; (2) that in respect the bills of lading for the cargo of the *Abington* specially excepted "any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship," the owners of cargo saved are not, so far as concerns any question of contribution, in a position to plead the fault of the master; and (3) that the respondents did not, before the 25th of October, 1886, make a sufficient legal tender. The parties were not agreed as to the facts upon which the second of these contentions is based; but there was no controversy as to the facts upon which the first and third of them depend. It was conceded by the appellants that the *Abington* was stranded through the negligence of her master; and, on the other hand, the respondents admitted that the effect of her stranding was to place both ship and cargo in a position of such imminent danger as to make it prudent and necessary to sacrifice part of the cargo in order to preserve the remainder of it and the ship. The question whether the respondents made a legal tender depends upon the construction of the correspondence which passed between the parties in October, 1886.

The first question raised is one of general importance, and, so far as their Lordships are aware, has never been made matter of direct decision in this country. It may be convenient in dealing

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with it to consider first of all the rights and remedies which the owners of cargo thrown overboard have in a proper case of jettison. Some of the qualities of their right, and of the remedies by which it may be enforced, have been authoritatively defined. Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo, for a pro ratâ contribution towards his indemnity, which he can enforce by a direct action. In *Dobson* v. *Wilson* (1) Lord Tenterden said: "If a shipper of goods which are sacrificed for the salvation of the rest of the cargo is entitled to receive a contribution from another shipper whose goods are saved, I know not how I can say that this may not be recovered by an action at law. This is a legal right, and must be accompanied with a legal remedy."

Again, it is settled law that, in the case of a general ship, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the ship-master, whom the law of England, following the principles of the Lex Rhodia, regards as his agent for that purpose. The duty being imposed by law upon the master, he is answerable for its neglect. In the course of the argument, his liability in that respect was questioned upon the authority of certain dicta of Lord Eldon's in *Hallett* v. *Bousfield* (2). The circumstances of that case were very special. One of a number of persons alleging a right to contribution applied for an injunction to restrain the master from delivering the cargo without taking security, the bulk of them having consented to his so doing. Lord Eldon expressed a doubt whether it was the right of every owner of part of the jettisoned cargo to compel the captain to call on every owner of cargo saved to give security; but he dismissed the application on the ground that there was no instance of such an equitable remedy having been granted. Courts of Equity are chary of granting injunctions which may lead to inconvenient results; and it does not follow from *Hallett* v. *Bousfield* that a master might not be restrained

(1) 3 Camp. 484. (2) 18 Ves. 190.

from making delivery of the cargo, at the instance of all or most of those entitled to contribution, without taking security for their claims. But their Lordships see no reason to doubt that, assuming the applicant's claim for contribution in that case to have been well founded, he would have had his remedy at law. In *Crooks & Co.* v. *Allan* (1), Lord Justice (then Mr. Justice) Lush held that a master or shipowner is bound to exercise the power he is invested with when a general loss has arisen, and to use the means in his power for adjusting the average claims and liabilities and securing their payment, and he accordingly ordained the defendants, who had neglected to perform that duty, to pay to the plaintiffs the whole amount of contribution to which they were entitled. The learned Lord Justice observed (2) that "the right to detain for contribution is derived from the civil law, which also imposes on the master of the ship the duty of having the contribution settled and of collecting the amount, and the usage has always been substantially in accordance with that law, and has become part of the common law of England."

The rule of contribution in cases of jettison has its origin in the maritime law of Rhodes, of which the text, as preserved by *Paulus* (3), is, "Si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.' The principle of the rule has been the frequent subject of judicial comment. Lord Bramwell, in *Wright* v. *Marwood* (4), said that, to judge from the way in which contribution is claimed in England, "it would seem to arise from an implied contract inter se to contribute by those interested." The present Master of the Rolls, in *Burton* v. *English* (5), disputed that view, and stated his opinion to be that the right to contribution "does not arise from any contract at all, but from the old Rhodian laws, and has been incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, when natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one, in order that the whole adventure may be saved." Whether the

(1) 5 Q. B. D. 38.
(2) 5 Q. B. D. 42.
(3) Dig. L. 14, tit. 2.
(4) 7 Q. B. D. 67.
(5) 12 Q. B. D. 220.

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rule ought to be regarded as matter of implied contract, or as a canon of positive law resting upon the dictates of natural justice, is a question which their Lordships do not consider it necessary to determine. The principle upon which contribution becomes due does not appear to them to differ from that upon which claims of recompense for salvage services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved.

There are two well-established exceptions to the rule of contribution for general average, which it is necessary to notice.

When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save. *Schloss* v. *Heriot* (1) is the leading English authority upon the point. In that case, which was an action by the shipowner against the owners of cargo for contribution in an average loss, a plea stated in defence, to the effect that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness, was held to be a good answer to the claim by Chief Justice Erle, and Willes and Keating, JJ.

The second exception is in the case of deck cargo. The

(1) 14 C. B. (N.S.) 59.

reason why relief by general contribution is denied to the owners of goods stowed on deck, when these are thrown overboard in order to save the cargo under hatches, is obvious. According to the rules of maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the vessel; and their jettison is therefore regarded, in a question with the other shippers of cargo, as a justifiable riddance of incumbrances which ought never to have been there, and not as a sacrifice for the common safety. But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck; and the exception does not apply, either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship.

It appears from the proceedings in this suit that the average claims at the instance of cargo owners exceed $30,000, and that there is a small claim on account of ship. The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the *Abington*, unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers. But the negligent navigation of the master cannot, in the opinion of their Lordships, afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution. They were not privy to the master's fault, and were under no duty, legal or moral, to make a gratuitous sacrifice of their goods, for the sake of others, in order to avert the consequences of his fault. The Rhodian law, which in that respect is the law of England, bases the right of contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence; and such exceptions as that recognised in *Schloss* v. *Heriot* (1) are in truth limitations on the rule, which have been introduced, from equitable considerations, in the case of actual wrongdoers, or of those who are legally

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responsible for them. The owners of goods thrown overboard having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves.

In support of the legal proposition which they induced the learned Recorder to accept, the respondents relied upon a passage which is to be found in the original text of Lord Tenterden's work on Shipping (ed. 1881, p. 499). It is in these terms:—"The goods must be thrown overboard for the sake of all, not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped or received the goods, but because at a moment of distress and danger their weight, or their presence, prevents the extraordinary exertions required for the general safety." It appears to their Lordships that, if Lord Tenterden had really meant to lay down the rule that there can be no contribution for jettison in the case of a ship overladen through the fault of those who received and put her cargo on board, he would have done so in plain terms. What he does say is, that there can be no proper jettison from an overladen ship, so long as ship and cargo are exposed to no peril whatever from the action of the sea, but are merely exposed to the inconvenience of being unable to reach their destination in the ordinary course of time.

The authority upon which the respondents placed their chief reliance was that of Mr. Parsons, who, in his treatise on the Law of Insurance (vol. ii., p. 285), and also in his Law of Shipping (vol. i., p. 211), states that "when a jettison is justified by the circumstances in which it takes place, and these circumstances are occasioned by the fault of the master, or his want of care or skill, the jettison would give no claim for contribution; but the owners of the ship would be liable to the owners of the goods jettisoned for the damages caused by the wrongdoing of the master." In both works, the proposition is laid down in precisely the same terms, and the same cases are referred to. These treatises are justly regarded as of great authority in questions of maritime law: but their Lordships are constrained to say that

in their opinion the text above cited is inaccurate, in so far as it bears that no claim of contribution will arise to the owners of jettisoned cargo in the case supposed, and is unsupported by the decisions upon which it is founded, which, all of them, relate to one or other of the exceptions already noticed.

Upon the question of legal tender, their Lordships are unable to concur in the opinion expressed by the learned Recorder. The correspondence which passed, before the deposit was paid, appears to them to shew that both of the parties were exceedingly unaccommodating, and somewhat unreasonable, and that neither of them was altogether in the right.

Their Lordships, even if it had been desirable to decide the second point urged for the appellants, are not in a position to do so, because there is no proof and no admission to the effect that, as alleged by them in argument, all the bills of lading for goods shipped in the *Abington* contained the same exception with those produced, of the master's act, neglect, or default in navigating the ship. But this is not a suit for recovery of contribution; and the appellants, if it be necessary, will not be precluded from substantiating their averments in the adjustment of average claims.

The result is that their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to dismiss the respondents' action, with costs in the Court below. The respondents must also pay the costs of this appeal.

Solicitors for appellants: *Crump & Son.*
Solicitors for respondents: *Badham & Gore.*

[PRIVY COUNCIL.]

J. C.*
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July 9, 10, 11; Aug. 1.

NORTH SHORE RAILWAY COMPANY . DEFENDANT;

AND

PION AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Lower Canada—Riparian Rights—River tidal and navigable—Obstruction to accès et sortie—Right of Action.

The appellants made a railway upon the foreshore of a tidal and navigable river by means of an embankment extending along the entire length of the respondents' frontage, cutting off all access to the water from the respondents' land except through one opening left in the said embankment and another opening just outside the respondents' boundary:—

Held, that, by the French law prevailing in Lower Canada, the respondents as riparian owners had the same rights of accès et sortie as they would have had if the river had not been navigable; that the above obstruction to such rights without parliamentary authority was an actionable wrong; that the substituted openings above-mentioned were no answer to a claim for indemnity.

There is no distinction in principle between riparian rights on the banks of navigable or tidal, and on those of non-navigable rivers. In the former case, however, there must be no interference with the public right of navigation; and in order to give rise to riparian rights the land must be in actual daily contact with the stream, laterally or vertically.

Lyon v. *Fishmongers' Company* (1 App. Cas. 662) followed and held to be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the lex loci.

Held, that under the Quebec Railway Consolidation Act, 1880, sect. 9, no authority is given to a railway company to exercise its powers in such a manner as to inflict substantial damage upon land not taken without compensation:—

Held, further, that as the appellants had not taken the steps necessary under the Act of 1880, to vest in them the power to exercise the right or do the thing for which compensation would have been due under the Act, an action by the respondents for damages and the removal of the obstruction, would lie; in which if the obstruction were not ordered to be removed damages as for a permanent injury to the land could be recovered.

Corporation of Parkdale v. *West* (12 App. Cas. 602) followed.

APPEAL from a decree of the Supreme Court (June 20, 1887), reversing a decree of the Court of Queen's Bench (Feb. 4, 1886)

* *Present*:—THE EARL OF SELBORNE, LORD WATSON, LORD BRAMWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

and restoring a decree of the Superior Court for Lower Canada (March 26, 1885), which awarded $5500 damages to the respondents.

The question was as to the liability of the appellants by reason of the construction by them of an embankment upon the foreshore of the River St. Charles, whereby the access to the river from a manufactory and premises belonging to the respondents, had been cut off.

The River St. Charles, which is a tributary of the St. Lawrence, is a tidal river, and was admitted to be navigable by boats, barges, and other craft at and below the point in question in a practical and profitable manner, and is therefore, according to the Law of Lower Canada, a public highway.

Upon the acquisition of the premises in question, the respondents erected a large manufactory suitable for leather dressing and dyeing, and removed their business to the new premises. They also constructed a quay upon the river frontage of their premises, which they used to a large extent in the landing of wood and coal used in their business, and for washing of hides.

In the spring and summer of 1882 the appellants, who were incorporated by the 45 Vict. c. 20 (Statutes of Quebec) erected upon that part of the beach of the River St. Charles which lies between high and low-water mark, an embankment for their railway, and proceeded to lay their line upon such embankment. This embankment extended along the whole length of the respondents' river frontage, and cut off their access to the river, except at two openings, one in front of, the other adjoining, the respondents' premises, through which the river was accessible at certain high tides. The height of such embankment opposite the respondents' premises was fourteen to fifteen feet, and the width at the top was fifteen feet.

Mr. Justice Casault, before whom the case was tried, gave judgment for the appellants with $5500 damages. He found as a fact that the embankment erected by the appellants had deprived the respondents' property of access to the river and had thereby caused to the said property a permanent deterioration and diminution of value to the above amount.

The Court of Queen's Bench, consisting of Dorion, C.J., and

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Monk, Ramsay, Cross and Baby, JJ., reversed the above judgment and entered judgment for the appellants, Ramsay, J. (who agreed with Mr. Justice Casault), dissenting. Dorion, C.J., who delivered the judgment of the majority, held, that, inasmuch as the beach of the river was public property, the respondents had only a right in common with other inhabitants of the country to use it as long as the Crown should not devote it to any other purpose, and that the taking away of this right gave the respondents no cause of action. He also held that the appellants had constructed the line under statutory powers which authorized them to do so, and consequently were under no liability to the respondents.

The Supreme Court of Canada reversed the decision of the Court of Queen's Bench by a majority of four judges to two. Mr. Justice Fournier, with whose judgment Chief Justice Ritchie and Mr. Justice Henry agreed, held that the respondents as riparian proprietors upon a navigable river had, as an incident of such proprietary right, a right of access thereto, and that the appellants by depriving them of this right had committed an actionable wrong. He further held that the appellants had shewn no grounds of justification under their statutory powers. Mr. Justice Taschereau, who, together with Mr. Justice Strong, dissented from the judgment of the Court, substantially agreed with the reasons of Chief Justice Dorion in the Court below, and further held that the remedy (if any) of the respondents was by arbitration. Mr. Justice Gwynne held that the damage done to the selling and letting value of the property of the respondents by the acts of the appellants gave to the former a right of action, and he based his decision upon dicta in the case in the Privy Council, of *Bell* v. *Corporation of Quebec* (1), upon the cases of *Metropolitan Board of Works* v. *McCarthy* (2), and *Caledonian Railway* v. *Walker's Trustees* (3), and upon certain Canadian decisions. He further held that it was not open to the appellants upon their pleadings to justify, under statutory authority, the acts committed, and that as matter of fact there was no statutory or other justification shewn.

(1) 5 App. Cas. 98. (2) Law Rep. 7 H. L. 243.
(3) 7 App. Cas. 259.

Sir *Horace Davey*, Q.C., and *Fullarton* (*Lacoste*, Q.C., of the Canadian Bar, with them), for the appellants, referred to *Lyon* v. *Fishmongers' Company* (1) and said that the substantial question in the case was whether according to the law of Quebec the respondents had a right of access to the river as in that case, or any greater right in that respect than the public. They contended, in the first instance, that according to C. C. P., sect. 17, the judge had no power under the pleadings to assess damages for the permanent injury but only up to action brought. Also that when Casault, J.'s judgment was examined he, in assessing damages, gave the respondents damages for loss of business contrary to the Railway Acts.

According to the law of Canada a person or company acting under the authority of the Crown (owner of the foreshore) is not liable in damages to the owner of premises which abut on the foreshore, though such premises are damaged in value. This is not a case of expropriation. The Crown can cut up parts of the foreshore and so can a railway company authorized by the Crown. A further point is, that supposing the respondents had any right to compensation, they should have proceeded by arbitration under the Railway Acts and not by action. The Acts relating to the matter are 16 Vict. c. 100 (incorporating the Railways Clauses Act, 14 & 15 Vict. c. 51), see Consol. Stat. of Canada, 22 Vict. c. 66, 45 Vict. c. 67 (Canada), 45 Vict. c. 20 (Quebec), 46 Vict. c. 24 (Canada) and 49 Vict. c. 109 (Canada). *Lyon's Case* (1) was commented on in *Bell* v. *Corporation of Quebec* (2). The observations in that case are dicta only. It is contended that a riparian proprietor's right to use a highway or navigable and tidal river is no higher than that of any one of the public. There is no such right of access, or such servitude of access as is claimed here under Canadian or French law. The obstruction of such rights as exist here is not an actionable wrong. See *Mayor, &c., of Montreal* v. *Drummond* (3); *Queen* v. *Baird* (4); *Starne* v. *Molson* (5). Reference was also made to *Bell* v. *Corporation of Quebec* (6); *In re Joanne Rousseray*, Sirez's Recueil Général des

(1) 1 App. Cas. 662.
(2) 5 App. Cas. 100.
(3) 1 App. Cas. 384.
(4) 4 L. C. R. 324.
(5) 1 Montreal L. R. Q. B. 425.
(6) 5 App. Cas. 84.

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Lois et des Arrêts, 1865, part 2, p. 246; Sourdat, Traité de la Responsabilité, vol. i., No. 431; *Re Daube*, Sirez Villeneuve, 1849, part 2, p. 383.

Bompas, Q.C., and *Gore* (*Langelier*, Q.C., of the Canadian Bar, with them), for the respondents, contended that the river being at the place in question navigable, was and is a highway, and that they as riparian proprietors had by the law of Canada droit d'accès et sortie. That is, they had a right in the nature of an easement to access to and from such highway to the premises in question. The appellants had deprived them of that right. See Demolombe, vol. 12, sect. 699, and *Bell* v. *Corporation of Quebec* (1). By French as well as by English law a riparian owner exercising a right of way over public domain, has a real right. See *Mayor of Montreal* v. *Drummond* (2); Proudhon, Domaine Public, vol. i., art. 369; *Starne* v. *Molson* (3). These cases and others cited by Taschereau, J., do not support the appellants' case. But even if the respondents' right of user in reference to the said highway is no more than that of any other of the public, still the erection of the embankment in question was, as regards the public, wrongful. At the highest it was only legal on the terms that the appellants should make due compensation to persons whose property should be injured thereby.

Then as regards the right to bring this action. [LORD SELBORNE:—Does this arise under a plea of the general issue?—] But for sect. 27 of the Railways Act, it would be clear that the point could not be taken under the general issue. [LORD WATSON:—See C. C. P. sect. 107.] The appellants had failed to shew that they had complied with sects. 7 & 9 of 43 & 44 Vict. c. 43 (Quebec), either as regards deposit of plans, giving of notices, or tender of compensation. All these acts were conditions precedent to the appellants' right to execute any works which would injuriously affect the respondents' property. Consequently the respondents' remedy was not by arbitration under the Act, but by action. Where the Crown or any one with statutory powers interferes with private property the proprietor

(1) 5 App. Cas. 98. (2) 1 App. Cas. 405.
(3) 1 Montreal L. R. Q. B. 425.

has a right to compensation even if the statute is silent. The French authorities are to that effect: see 26 Sirez, part 1, p. 267; 25 Sirez, part 1, p. 297. Reference was also made to *Corporation of Parkdale* v. *West* (1) and *Jones* v. *Stanstead Railway Company* (2).

Fullarton replied, contending that the deposit of plans with and the consent of the Government Railway Department were sufficient, and involved the assent of the necessary authorities, since 43 & 44 Vict. c. 3 (Quebec), following on 39 Vict. c. 2, and 41 & 42 Vict. c. 4. The respondents had not claimed compensation either before or in this action, and had no other right.

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The judgment of their Lordships was delivered by

EARL SELBORNE:—

The appellants in this case are a Canadian Railway Company, against whom an action was brought by the respondents, tanners at Quebec, in October, 1883. The respondents carried on their business upon riparian land belonging to them, which had a frontage of considerable length to the St. Charles, a tidal navigable river within the limits of the harbour of Quebec. The appellants in 1883 made their railway upon the foreshore of that river, by means of an embankment extending along the entire length of the respondents' frontage, not, however, taking any part of the respondents' land; and in this embankment they left one opening, fifteen feet wide and twelve or thirteen feet high, opposite to the tannery, through which the river was accessible at low tides and at some (but not all) high tides. With that exception they cut off all access to the water from the respondents' land, which before those works were executed was always accessible for boats at high water along its whole frontage. The appellants also made another opening, just outside the boundary of the respondents' land, and opposite to the end of a public street, through which the respondents might, except at certain high tides, have found access by means of that street to the water. No compensation or indemnity was paid or offered by

(1) 12 App. Cas. 602. (2) Law Rep. 4 P. C. 98.

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the appellants to the respondents; who brought their action, complaining that they had been unlawfully shut out from their access to the river, and asking for damages, and that the company might be compelled to demolish and remove the obstruction.

On the 26th of March, 1885, Casault, J., the judge of the Superior Court of Lower Canada, gave judgment for the plaintiffs, not ordering the demolition or removal of the railway company's works, but giving $5500 as damages for the permanent deterioration and diminution in value of the plaintiffs' land, independently of the trade carried on upon it. On appeal, the Court of Queen's Bench for Lower Canada, by a majority of four out of five judges, reversed that judgment. The grounds of reversal, as stated on the face of the order, were, that the company had not taken any part of the plaintiffs' land nor caused it any physical damage ("dommage matériel"), but "had only, by constructing their railway between the plaintiffs' property and the river, deprived them of the power which they had previously had of communicating freely with the river, and of the advantages of the navigation for the purposes of their business; and that this power of access to the river was not an exclusive advantage, but, on the contrary, might be exercised by all the Queen's subjects, and conferred upon the plaintiffs no more than indirect advantages, without giving them the right to an indemnity for the loss of those advantages."

The plaintiffs appealed to the Supreme Court of Canada, which, on the 20th of June, 1887 (also by a majority of four out of five judges), reversed the judgment of the Court of Queen's Bench, and restored and affirmed that of the Superior Court of Lower Canada. The present appeal to Her Majesty in Council is from that judgment.

It appears clear to their Lordships, that the judgment of the Court of Queen's Bench, which the Supreme Court reversed, could not be maintained upon the grounds assigned for it, unless the rights which belong by the law of Lower Canada to the owners of riparian lands, on the banks of a river which is not navigable, are denied to them when the river is (as in this case) navigable and tidal. Unless that proposition can be established,

what was said by Lord Cairns in the case of *Lyon* v. *Fishmongers' Company* (1) must be as true and as applicable at Quebec as in England. Distinguishing the public right of navigation from the rights belonging to the owner of the riparian land as such, his Lordship said,—"When this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place, and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction."

In the view of their Lordships, this case raises for decision two, and only two, substantial questions,—first, whether the land of the respondents (plaintiffs below) has suffered, by the execution of the railway company's works, any such damage or injury as to make an indemnity due to them from the company; and secondly, whether the respondents have taken the proper course for obtaining that indemnity, if it is their right. In their Lordships' judgment, the first of those questions must, upon the facts, be answered in the respondents' favour, unless it can be made out that, by reason of some distinction in the law of Lower Canada between navigable or tidal and non-navigable rivers they had not those rights as riparian owners in the locus in quo, which they would have had if the river had not been navigable. Upon this point their Lordships consider that the burden of proof was upon the appellants; the Supreme Court has held the contrary; and their Lordships could not advise Her Majesty to reverse the judgment of that Court, unless satisfied that it was erroneous.

In *Miner* v. *Gilmour* (2), this tribunal determined, after two arguments (in 1858), that with respect to riparian rights (in that case the river was not tidal or navigable), there was "no material distinction between the law of Lower Canada and the law of England." Lord Kingsdown, delivering the judgment of the committee, said:—"By the general law applicable to running

(1) 1 App. Cas. 671. (2) 12 Moore, P. C. 157.

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streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes, and for his cattle; but, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him." The question, whether this general law was, in England, applicable to navigable and tidal rivers arose, and (with the qualification only that the public right of navigation must not be obstructed or interfered with) was decided in the affirmative by the House of Lords, in *Lyon* v. *Fishmongers' Company* (1). That decision was arrived at not upon English authorities only, but on grounds of reason and principle, which (if sound, as their Lordships think them) must be applicable to every country in which the same general law of riparian rights prevail, unless excluded by some positive rule or binding authority of the lex loci. The reasons assigned by Dorion, C.J., in the Court of Queen's Bench for the judgment of that Court were not addressed to any distinction in principle between riparian rights on the banks of navigable or tidal and on those of non-navigable rivers, but they treated the complaint as if it turned upon a claim to use, not the plaintiffs' riparian land, but the beach or foreshore belonging to the Crown, for access to the river. If this had been so, and if the plaintiffs' land had been at all times divided from the river by a dry beach or foreshore in the nature of a public highway, open to all the Queen's subjects, the same question might have arisen here, which was considered and determined in England in the case of the *Metropolitan Board of Works* v. *M'Carthy* (2). But that is not the state of facts with which their Lordships have to deal. The grêve, or foreshore, is not mentioned in the plaintiffs' declaration, which alleges an obstruction of the plaintiffs' access to "the River St. Charles," and the construction of a quai, about fifteen feet high, completely shutting off the plaintiffs' access to the said "river"; and that the plaintiffs' access from their property "to the said river" had been rendered impossible. The fact being established by the evidence, that the plaintiffs' bank was

(1) 1 App. Cas. 683. (2) Law Rep. 7 E. & I. 243.

always accessible with boats at high water, what was said in *Lyon* v. *Fishmongers' Company* (1), is equally applicable here:—"It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream; but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right."

The only ground of distinction suggested between a non-navigable river (such as that in *Miner* v. *Gilmour* (2)) and a navigable or tidal river, forming at high water the boundary of riparian land, was that in the case of a non-navigable river the riparian owner is proprietor of the bed of the river ad medium filum aquæ, which, in the case of a navigable river such as the St. Charles, belongs to the Crown. The same distinction was contended for in *Lyon* v. *Fishmongers' Company* (1); but the House of Lords, on grounds with which their Lordships concur, thought it immaterial. Lord Cairns rejected the proposition that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream; he adopted the words of Lord Wensleydale in *Chasemore* v. *Richards* (3):—"The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has now been settled that the right to the enjoyment of a natural stream of water on the surface, ex jure naturæ, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state." It was said in the same case of *Lyon* v. *Fishmongers' Company* (1), "It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good, jure

(1) 1 App. Cas. 683. (2) 12 Moore, P. C. 131.
(3) 7 H. L. C. 349.

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naturæ, as vertical; and not only the word 'riparian,' but the best authorities, such as *Miner* v. *Gilmour* (1), and the passage which one of your Lordships has read from Lord Wensleydale's judgment in *Chasemore* v. *Richards* (2), state the doctrine in terms which point to lateral contact rather than vertical." This is followed by the words already cited as to its being sufficient that this contact should exist daily, in the ordinary and regular course of nature, though it may not continue during the whole of any day.

Their Lordships have considered the authorities referred to in support of this part of the appellants' argument, and they are of opinion that none of them tend to establish the non-existence of riparian rights upon navigable or tidal rivers in Lower Canada, or to shew that the obstruction of such rights without Parliamentary authority would not be an actionable wrong, or that, if in a case like the present the riparian owner would be entitled to indemnity under a statute authorizing the works on condition of indemnity, the substituted access by openings such as those which the appellants in this case have left would be an answer to the claim for indemnity. The French law prevailing in Lower Canada recognises generally, in cases of this nature, the right of accès and sortie; and under that law any substantial obstruction of it, by persons in other respects authorized, would give (primâ facie) a right to indemnity. The only authorities relied upon by the appellants to which their Lordships think it necessary now to refer are two Lower Canada cases—*Reg.* v. *Baird* (3) and *Starnes* v. *Molson* (4), and a modern French case, *In re Joanne Rousseray*, quoted from the Second Part of Sirey's Decisions of the Imperial Courts in 1865.

In *Reg.* v. *Baird* (4) there was upon the facts, as proved, no question of riparian right, or of any obstruction of access to the river. The dispute related to land which the nuns of a certain religious house at Quebec had reclaimed from the foreshore of the river, so that the water ceased to flow over it (5), and to which the Crown had afterwards established its title. The only

(1) 12 Moore P. C. 131.
(2) 7 H. L. C. 349.
(3) 2 Low. Can. Rep. 345.
(4) 1 Montreal L. R. 425–431.
(5) 4 Low. Can. Rep. 339.

question was whether the Crown could grant it to other persons without giving that religious house a right of preference or pre-emption, and this question was determined in favour of the Crown. In the grant actually made there was a condition, reserving free access to the inhabitants there, and to the public generally, to pass and repass at all times over the wharves and roads. That case throws no light upon the present controversy.

In *Starnes* v. *Molson* (1) (decided in 1885) riparian land fronting upon the River St. Lawrence was taken by a railway company, and a separate sum was assessed as indemnity for the loss of the river frontage belonging to that land. This the Court held to be wrong, on the ground apparently that nothing ought to have been valued except the land taken to which that frontage belonged. It is not clear to their Lordships that the Court in that case meant to determine that the land ought to have been valued as if it had no frontage to the River St. Lawrence, or as if it possessed no riparian rights. If the decision ought to be regarded as having any such consequence, their Lordships could not hold themselves bound by it upon the present appeal.

The French case of Rousseray was considered by Mr. Justice Taschereau to be in point to the present; but their Lordships are unable to concur in that opinion. Even if it ought to be assumed (which is far from certain) that the law on which it was decided was in substance identical with the old French law in force in Lower Canada before the British Conquest, that case turned upon considerations which, in their Lordships' judgment, make it irrelevant to the question before them. It was the case of an opus manufactum, or pier, projecting into the bed of the River Seine, which a riparian owner had erected under a revocable license from the proper authorities. Those authorities afterwards executed works in the river which obstructed or prevented its use; and it was held that, as they could revoke the license whenever they pleased, the riparian owner had such use by tolerance only, and not of right, and that there was no claim for compensation.

Most of the other French authorities cited, and also the case before this tribunal of *Mayor of Montreal* v. *Drummond* (2), related not to riparian rights, but to the extent to which the owner

(1) 1 Montreal L. R. 425–431. (2) 1 App. Cas. 406.

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of a house fronting a public street could claim compensation from the public authority for the indirect effect upon his convenience, as owner of such house, of obstructions or alterations in the street, made by that authority, at points more or less remote from his frontage. None of them had any tendency to shew that if the direct and immediate access to the street from his house had been wholly or in part cut off, so as to take away or substantially diminish his right of accès to, or of sortie from, the house itself, this would not have been a proper subject of indemnity. The contrary was treated as law by the Judicial Committee in *Mayor of Montreal* v. *Drummond* (1) and *Bell* v. *Corporation of Quebec* (2).

Their Lordships, therefore, concur in the view of the first question in this case taken by the Supreme Court of Canada. It remains to be considered whether the respondents' action was properly brought. That depends mainly upon the provisions of the Quebec Railway Consolidation Act of 1880.

The provisions and structure of that Act are too widely different from those of the English Lands Clauses and Railway Clauses Consolidation Acts to enable their Lordships to derive aid from the cases which have been decided upon those English Acts. In the English Acts special and separate provision is made for lands not taken, but injuriously affected, and the procedure for obtaining compensation, applicable both to lands taken and to lands injuriously affected, is defined so as to enable the landowner, as well as the company, to take, or cause to be aken, in all cases the necessary steps for that purpose. But in the Quebec Act of 1880 this is not so.

That Act throws upon the company, in all cases, the obligation of depositing maps and plans, and, till these are deposited, the railway is not to be proceeded with. Of this, when it is done, notice must be given in certain newspapers, and then, after one month, the company (under sect. 9, sub-sect. 11) may apply to the owners of lands or to parties empowered to sell lands, "or interested in lands which may suffer damage from the taking of materials or the exercise of any of the powers granted to the railway;" and thereupon agreements may be made between them "touching the said lands, or the compensation to be paid for the

(1) 1 App. Cas. 406. (2) 5 App. Cas. 97, 98.

same, or for the damages, or as to the mode in which such compensation shall be ascertained;" and if the parties differ, then all questions which arise between them shall be settled, as provided in the following sub-sects. of clause 9.

Of these, it is only necessary to refer to four: the first of which (sub-sect. 12) provides, that the deposit of the map and plans shall be deemed a general notice to all parties of the lands which will be required for the railway and works; the second (sub-sect. 13) that a special notice, to be served upon the landowner, shall contain an offer on the part of the company of what they deem a fair compensation "for such lands, or for such damages," and the nomination of an arbitrator to act for the company, if the offer is not accepted; and such notice is to be accompanied by the certificate of a sworn surveyor of the Province that the sum offered is, in his opinion, a fair remuneration for the land and for the damages caused. Then follow clauses regulating the procedure by arbitration when the company's offer has been made and is not accepted, and enabling the arbitrators to award a sum of money or an annual rent. Then comes sub-sect. 28; providing that "upon payment or legal tender of the compensation or annual rent awarded or agreed upon to the party entitled to receive the same, or upon the deposit in Court of the amount of such compensation in the manner after mentioned, the award or agreement shall vest in the company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing, for which such compensation or annual rent has been awarded or agreed upon;" with power for a judge to give effect to the right so vested in the company, in case of resistance or forcible opposition.

These provisions all depend on the original notice, required to be given by the company; and the landowner is not expressly authorized to take any step himself in default of the proper procedure by the company, except (by sub-sect. 37) in three specified cases, which do not include the simple case of damage to land not taken or used, by the exercise of the powers granted to the company. That sub-section is in these words:—"If the company has taken possession of any land, or performs any work thereon, or has removed materials therefrom, without the amount

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of compensation having been agreed upon or determined by arbitration, the owner of the land or his representative may himself cause the valuation of the land, or of the materials taken, to be made, without prejudice to other legal recourse, if possession has been taken without his consent."

Upon consideration of these provisions, their Lordships think it clear that no authority was given, or intended to be given, to the railway company to exercise its powers in such a manner as to inflict substantial damage upon land not taken without compensation.

The appellant company, although its maps and plans were duly deposited, never made the application to the respondents contemplated and authorized by sect. 9, sub-sect. 11, and never gave them any notice, or made them any offer, or named an arbitrator, as required by sub-sect. 13. No compensation for the damage done to the respondents' land was awarded or agreed upon, and (of course) no payment, tender, or deposit of such compensation was made.

The effect of provisions similar to those of the Quebec Act of 1880 was lately considered by the Judicial Committee in the case of the *Corporation of Parkdale* v. *West* (1). In that case certain railway companies had lowered the roadway of a public street in front of the plaintiff's property at Toronto, so as to deprive him of the access to the street which he had previously enjoyed; and it was held to be a condition precedent of the right to exercise, as against him, the powers of the Act, that the company should have taken the prescribed means of ascertaining the compensation due to the plaintiff, and have paid, tendered, or deposited the amount of such compensation, which they had not done; and under those circumstances, the execution of the work was held to be unlawful, and to give the plaintiff a right of action for damages. The nature of the injury done in the present case was similar, with the difference only that there the access obstructed was to a street, here to a river. In both cases alike, the damage to the plaintiffs' property was a necessary, patent, and obvious consequence of the execution of the work.

That authority appears to their Lordships to be in point,

(1) 12 App. Cas. 602.

unless there is some sufficient reason why they should not follow it. It has been suggested that it is in conflict with an earlier decision of this tribunal, in *Jones* v. *Stanstead Railway Company* (1), and that the point did not require determination in the *Parkdale Case* (2), in which no maps or plans had been deposited, and the execution of the works of the railway companies was, on that ground, clearly ultra vires.

The Lords of the Committee who decided the *Parkdale Case* (2) thought their decision reconcileable with *Jones* v. *Stanstead Railway Company* (1); and, although it is true that the other ground mentioned might have been sufficient to dispose of that appeal, both points were taken in the argument, and the judgment was pronounced upon both. The words of sect. 9, sub-sects. 11 and 28, of the Act by which the present case must be governed, are the same as those of the corresponding Act on which the *Parkdale Case* (2) depended; they deal, uno flatu, with compensation for land taken and for damage to land not taken; and it cannot be denied that their natural primâ facie import is to make the ascertainment, and payment, tender, or deposit of compensation a condition precedent of "*vesting in the company the power*," in the one case to "take possession of the land," and in the other to "exercise the right, or to do the thing for which the compensation shall have been awarded or agreed upon." Their Lordships find it very difficult to say that these words operate as a condition precedent in the one case but not in the other, at least when the damage to land not taken is (as in the present and in the *Parkdale Case* (2)) a necessary, patent, and obvious consequence of the construction of the work. It may well be that if the statute gives a right to compensation for damage of a different kind, which at the time when the company had to give its notices and take the other necessary steps to enable it to execute its works could not be foreseen, a different rule must be applicable, by necessary implication from the provisions, on the one hand entitling the landowner to compensation, and authorizing, on the other, the construction of the works. It could not be meant, in such a case, to nullify those provisions, against either the landowner or the company, by making them dependent upon

(1) Law Rep. 4 P. C. 98. (2) 12 App. Cas. 602.

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impossible conditions. But it does not follow that conditions, precedent according to their natural import, should not be held to be such as to all those matters to which their application, as condition precedent, is reasonably practicable.

This does not appear to their Lordships to be contrary to anything really decided in the case of *Jones* v. *Stanstead Railway Company* (1). The Judicial Committee had to deal in that case with a claim of the same kind which the House of Lords, in *Hammersmith Railway Company* v. *Brand* (2), determined to be incompetent under the English Acts; a claim to compensation for deterioration in value of a bridge over the River Richelieu belonging to the plaintiff, by reason of the company having carried their railway across that river by another bridge near the plaintiff's. "This injurious effect" (said their Lordships) "does not arise necessarily from the construction of the bridge, but may do so from the use of it; and it is apparent that if the railway had never been completed, or if no disturbance had taken place by its carrying traffic which would otherwise have come to his bridge, the appellant would not have been injuriously affected, or entitled to compensation at all" (3). It might well have been determined in that case, upon the principle of the *Hammersmith Railway Company* v. *Brand* (2) (for their Lordships thought the English authorities in point), that the plaintiff had no right to compensation. But there was another English authority of the *Queen* v. *Cambrian Railway Company* (4), afterwards overruled, which induced them to assume, for the purposes of their judgment, that the claim to compensation might possibly be capable of being maintained. The principle on which they proceeded was, that the ascertainment and payment or tender of compensation, before executing the works, could not reasonably be held, on the construction of the statute under which that railway was made, to be a condition precedent in cases in which "injuries might happen subsequently to the building of the railway, and as an unforeseen consequence of the works." "It is not reasonable," they said, "to suppose that

(1) Law Rep. 4 P. C. 98.
(2) Law Rep. 4 H. L. 171.
(3) Law Rep. 4 P. C. 120.
(4) Law Rep. 6 Q. B. 422; see also *Hopkins* v. *Great Northern Railway Company*, 2 Q. B. D. 224.

the legislature intended that the company should, *in cases like these*, be subject to actions as wrongdoers, and to the legal liability of having their works stopped, because compensation had not been first made to all persons injuriously affected by the consequence of their operations" (1). They thought, however, that the condition (expressed in the same terms as those of the Quebec Act of 1880) might properly be held precedent as to the taking of lands for making the railway. If so, it is difficult to deny to the same words, used uno flatu as to the taking of lands, and as to the exercise of powers causing damage to lands not taken, the same operation and effect, as far as the nature of the case will allow. It is true that there are expressions in the judgment delivered in *Jones* v. *Stanstead Railway Company* (2) which might seem to restrict the condition precedent to lands taken, as distinguished from lands injuriously affected. But their Lordships are not satisfied that it was intended to lay down a proposition wider than that necessary for the particular case.

Their Lordships will, in the present case, advise Her Majesty to act upon the more recent decision of this tribunal; the consequence of which is that they must hold this action to have been properly brought, on the ground that the appellants did not take the steps necessary, under the Act of 1880, to "vest" in them "the power to exercise the right, or do the thing," for which, if those steps had been duly taken, compensation would have been due to the respondents under the Act. This relieves their Lordships from the necessity of considering whether, if the condition were not precedent, when the company have failed to do what they ought to have done in order to have the amount of compensation settled under those provisions of the Act which they alone can put in force, and in a case to which sect. 9, subsect. 37, is not applicable, the landowner to whom indemnity is due would be bound, instead of bringing an action, to proceed by way of mandamus to the company to give notice, make an offer, and appoint an arbitrator, with a view to arbitration under the Act,—a point on which there are observations at the end of the judgment in *Jones* v. *Stanstead Railway Company* (2), which

(1) Law Rep. 4 P. C. 119, 120. (2) Law Rep. 4 P. C. 98.

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ought not, in their Lordships' opinion, to be held conclusive, if that question should hereafter arise. It is also unnecessary to consider whether the objection "that the only remedy the appellants had was by arbitration, under the statute, and not by action," was taken in sufficient time.

Their Lordships do not in this case proceed upon the assumption that the consent of the Lieutenant-Governor and Council of Quebec was not duly given to the use made by the railway company of the foreshore of the River St. Charles for the construction of their works. If it were necessary to determine that point, the facts would appear to their Lordships rather to justify the presumption, that all necessary consents of all the public authorities of the Province were given; and any other view would seem to be inconsistent with the first recital in the judgment restored and affirmed by the Supreme Court.

A demolition of the company's works not having been ordered, it appears to their Lordships (as it did in the *Parkdale Case*) (1), that it was proper to give damages as for a permanent injury to the plaintiffs' land.

The result of their Lordships' judgment is that they will humbly advise Her Majesty to affirm the decision of the Supreme Court, and to dismiss this appeal, with costs.

Solicitors for appellants: *Simpson & Co.*
Solicitors for respondents: *Bompas, Bischoff, Dodgson, & Coxe.*

(1) 12 App. Cas. 602.

[PRIVY COUNCIL.]

SUSAN McMULLEN . . . . . DEFENDANT;

AND

WADSWORTH . . . . . RESPONDENT.

J. C.*
1889
July 4, 5, 27.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Lower Canada—C. C. 1260, 6, 63—*Domicil.*

An acte de mariage in 1828, signed by husband and wife, recited that the husband was a day labourer of the city of Quebec:—

Held, that this did not amount to a binding declaration by the husband that he was domiciled in Lower Canada with the legal effect of a contract that the wife should be commune en biens with him. Domicil for purposes of marriage in sect. 63, C. C., is used in the sense of residence.

Art. 1260, C. C., is subject to art. 6. If no covenants are made, the consorts, so far as the Code applies, are presumed to have subjected themselves to the legal community of property. But moveable property is governed by the law of the owner's international domicil.

APPEAL from a decree of the Supreme Court (June 22, 1886), reversing a decree of the Court of Queen's Bench of Lower Canada, (Nov. 25, 1885), which affirmed a decree of the Superior Court for the district of Ottawa (May 13, 1884), in favour of the plaintiffs, maintaining the intervention of the above-named appellant, and declaring her entitled to one-fourth of the property possessed by James Wadsworth at the death of his wife Margaret Quigley. For a report of the case in the Queen's Bench, see 2 Montreal L. R. p. 113; and in the Supreme Court, see 12 Sup. Ct. Reports, p. 466.

The question involved in this appeal was one of domicil, and the facts relating to it are stated in the judgment of their Lordships.

The plaintiffs sued as grandchildren and heirs-at-law of Margaret Wadsworth. The respondent was the second wife of James Wadsworth, and universal legatee under his will. The suit was to recover one-half of the estate on the ground that

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"community of property" was established between the spouses at the former marriage, resulting from James Wadsworth's domicil in the province of Quebec. The appellant intervened and claimed as daughter of Margaret by a former marriage. The respondent pleaded that the domicil of James Wadsworth was in Upper Canada, that by the law neither of that province nor of Ireland nor of Ontario was community of property established by marriage between the parties thereto.

Irwine, Q.C. (Canada), and *Jeune*, Q.C., for the appellant, admitted that the domicil of James Wadsworth could not, apart from the marriage, be said to be in the province of Quebec. But it was contended that the effect of his declaration at the time of the marriage that he was of Quebec, was evidence of an agreement between the spouses that his domicil then and thereafter should be in that province. His domicil thereby became sufficient for the purposes of the marriage, and also under the circumstances to create a community of property as alleged. Reference was made to C. C. (Lower Canada), arts. 1260, 58, 63, and 65, and to *Laramée* v. *Evans* (1).

Fleming, Q.C. (Canada), and *Bremner*, for the respondent, were not heard.

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July 27.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

The question to be determined in this case is whether James Wadsworth, by his marriage in September, 1828, with Margaret Quigley, widow of James McMullen, subjected himself to the legal community of property as then established in Lower Canada.

The majority of the learned judges of the Supreme Court held that his international domicil was not in Lower Canada or Quebec, and the special leave to appeal to Her Majesty in Council was not granted for the purpose of reviewing that finding, which depended upon a mere question of fact, but in order to determine what was the legal effect of the certificate or acte de

(1) 25 Low. Can. J. 261.

mariage signed by Wadsworth and his wife, in which he was described as a day labourer, of the city of Quebec, and by which two of the learned judges of the Supreme Court held that he was bound as amounting to a declaration that he was domiciled there.

"Mr. Justice Taschereau, one of those two judges, in his judgment says:—

"By representing to his wife, as he must be held to have done by the acte de mariage, that his domicil was at Quebec when he married, Wadsworth guaranteed to her, contracted with her in law, that she would be commune en biens with him. Now, could he have been admitted in his lifetime, under any circumstances, in an action en séparation de biens, for instance, to contend that this declaration as to his domicil was a false one, or, in other words, that he had induced his wife to marry him under false pretences or representations? Would he have been received so to invoke his own fraud in order to deprive his wife of her share of the community? Undoubtedly not. Well, who is the appellant here? Clearly, purely and simply, the representative of Wadsworth, the warrantor of his deeds, entitled to what he himself would have been entitled to, but to nothing more. How can she then invoke Wadsworth's fraud to deprive the respondents of their share of this community? And when she does so, when she avails herself of Wadsworth's fraud, is she not then herself, in the eyes of the law, committing a fraud?"

He added,—

"This is a very important case, not only for the parties thereto on account of the large amount involved, but also for the public at large. It involves an intricate question of international law, which, as pointed out by the learned Chief Justice of the Court of Queen's Bench, may hereafter often arise in this country. We expect in the near future from the United Kingdom, and in fact from all Europe, a large immigration, and evidently cases like the present one must eventually with us become more frequent. But further than that, a principle of not less importance for the Province of Quebec is at stake, that is, whether the rules of the French law as to evidence are to govern such cases or not. For the appellants, in the course of a most able and elaborate argument, have failed to cite a case from France

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in which it has been held that a different coutume than the one settled by the acte de mariage can be invoked to defeat a wife's claims or her heirs."

It was in consequence of the latter portion of this judgment, which was referred to in the petition for special leave to appeal to Her Majesty in Council, that the leave to appeal was granted. In discussing the case in the Courts below, as well as in the arguments of counsel before their Lordships, the Civil Code of Lower Canada has been referred to as containing the law upon the subject, for, although the Code was not in existence at the time of the marriage, it is admitted that it correctly expresses the law as it then existed, so far as this case is concerned.

Art. 1260 of the Code provides that, if no covenants have been made, or if the contrary has not been stipulated, the consorts are presumed to have subjected themselves to the general laws and customs of the country, and particularly to the legal community of property; but this article is subject to art. 6, which provides that moveable property is governed by the law of the domicil of the owner, and that persons domiciled out of Lower Canada are, as to their status and capacity, subject to the laws of their country. Even if this were not expressed, it is clear that the legislature of Quebec could not have intended to alter the international law of domicil. Much confusion has arisen from the use of the word "domicil" in two different senses. Sir Robert Phillimore, in his work on the Law of Domicil (p. 17), remarked, and in their Lordships' opinion correctly so, that "it might have been more correct to have limited the use of the word domicil to that which was the principal domicil, and to have designated simply as residences the other kinds of domicil; but a contrary practice has prevailed, and the neglect to distinguish between the different subjects to which the law of domicil is applicable has been the chief source of the errors that have occasionally prevailed on this subject." He refers to the discour pronounced by M. Malberbe on the introduction of the law of domicil into the Civil Code: "Chaque individu ne peut avoir qu'un domicile quoiqu'il puisse avoir plusieurs residences;" also to *Maltass* v. *Maltass* (1), where it is said, "The gradation

(1) 1 Rob. Ecc. 75.

from residence to domicil consists both of circumstances and intention."

Art. 79 of the Civil Code of Lower Canada speaks of the domicil of a person for all civil purposes, and art. 63 of a domicil for the purpose of marriage. The latter article is as follows: "The marriage is solemnized at the place of the domicil of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties. For the purpose of marriage domicil is established by a residence of six months in the same place." The words "for the purpose of marriage" refer to the previous portion of the article, and mean for the purpose of the solemnization of the marriage. The legislature never could have intended to enact by such expressions as these that no person should be married in Quebec unless he should have his international domicil there; still less could it have intended to alter the international law of domicil, and to enact that any person having his international domicil elsewhere should, by a temporary residence in Quebec for six months for the purpose of having his marriage solemnized there, lose his international domicil and acquire a new international domicil by election, so as to affect his status and civil rights.

Art. 1260 speaks of the general laws and customs of the country. The acte de mariage does not say that Wadsworth was of the Province of Quebec or Lower Canada, the country of which the laws and customs established the community of property on marriage, but merely that he was of the city of Quebec.

There could have been no intention on the part of Wadsworth when he signed the acte de mariage describing him as of the city of Quebec, labourer, to mislead or induce his wife to believe that by the marriage she would acquire community of property, for he was a mere day labourer, and she was a partner in the firm by which he was employed, and there was no probability at that time that he would acquire the large property of which he died possessed. The argument of Mr. Justice Taschereau as regards contract, guarantee, fraud, or misrepresentation on the part of Wadsworth is not based upon any solid foundation. In

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fact, the acte de mariage was signed after the marriage had been solemnized, in accordance with the provisions of arts. 64 and 65 of the Code of Civil Procedure.

It was not drawn up by Wadsworth, though it was signed by him, and the words "de cette ville" were probably introduced from a previous representation made by him, in order to obtain the solemnization of his marriage, that he had resided six months in the city. It is clear that the question of international domicil is one of general law, and that the doctrine of the Roman law still holds good, that "It is not by naked assertion, but by deeds and acts that a domicil is established." It certainly cannot be said that the case involves an intricate question of international law (to use the words of Mr. Justice Taschereau) if it depends upon whether Wadsworth contracted with his wife or was guilty of a fraudulent misrepresentation.

Their Lordships are of opinion that the word "domicil" in art. 63 was used in the sense of residence, and did not refer to international domicil. They are of opinion that a person having resided temporarily six months in Quebec would be entitled to have his marriage solemnized in that city, although he might be internationally domiciled elsewhere, and might refuse to change that domicil. It would be monstrous to suppose that an Englishman, Frenchman, or American travelling in Lower Canada, and retaining his domicil in his own country, could not be married in Quebec after a temporary residence there for six months without abandoning his international domicil in his own country, and altering his status and civil rights. For the above reasons their Lordships are of opinion that the decision of the majority of the Judges of the Supreme Court is correct, and that the judgment of that Court ought to be affirmed, and this appeal dismissed. They will humbly advise Her Majesty to this effect.

The appellant must pay the costs of this appeal.

Solicitors for appellant: *Simpson & Co.*

Solicitors for respondent: *Ashurst, Morris, Crisp, & Co.*

[PRIVY COUNCIL.]

SENÉCAL (NOW BY ORDER OF REVIVOR HIS WIDOW) . . . . . } DEFENDANT;

AND

PAUZÉ . . . . . PLAINTIFF.

J. C.*
1889
July 2, 3, 27.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Law of Lower Canada—Art. 1975 *C. C.—Pledge—Tender—Unilateral Contract —Construction.*

Where the owner of a thing pledged for a specific debt tenders the amount of the debt and the creditor is unable to restore it; *held*, that the tender cannot be regarded as insufficient under art. 1975 C. C., which gives a right to detain for other debts of the owner.

Where a document purports to be a unilateral contract, binding the signatories for an indefinite time to sell certain specified debentures of a company to one of its officers at a specified price; but the circumstances under which it was executed shewed that the real intention of the signatories was to limit for their common benefit their claims against the company, in order to facilitate some financial operation then contemplated:—

Held, that such intention controlled its effect, and that it could not be treated as an agreement for sale, for the benefit of such purchaser.

APPEAL from a decree of the Court of Queen's Bench (Sept. 21, 1886) reversing a decree of the Superior Court in review (Feb. 28, 1885) which reversed a decree of the Superior Court (July 9, 1884) being in favour of the respondent.

The facts and proceedings are stated in the judgment of their Lordships.

Sir *Horace Davey*, Q.C., and *Fullarton* (*Lacoste*, Q.C., of the Canadian Bar with them), for the appellant, contended that the judgment of the Court of Review was right and ought to be restored. The contract in this case of the 13th of September, 1878, was a true unilateral contract binding the signatories for an indefinite time to sell their debentures at a specified price. Unilateral contracts are not mentioned either in the Code

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Napoléon or Civil Code of Lower Canada. They are part of the old French law, and are still part of the law applicable in Lower Canada. Reference was made to Troplong, De la Vente, c. 1, p. 140, art. 114 et seq., being a commentary on art. 1589 of Code Napoléon; Pothier on Sale, part vi., c. l., Nos. 476 and 477 [LORD WATSON referred to art. 478]; 24 Laurent, De la Vente, p. 10, sect. 2, Nos. 6, 7 and 8; C. C. (L. Canada) arts. 1476, 1477. No acceptance by Greene of the irrevocable offer made to him by the said unilateral contract of the 13th of September, 1878, was necessary because it (the contract) was proved to have been made at Greene's request. It was a completed transaction, and Greene could have sued for the delivery up of Pangman's debentures. And Greene having transferred his rights to the appellant, the latter became beneficial owner and not pledgee. But a pledgee who after obtaining a pledge for the repayment of moneys becomes the creditor of the pledgor for another amount is not bound to restore the pledge until both debts are paid: see art. 1975 C. C.; *M'Donald* v. *Hall* (1); 16 Laurent, No. 16; C. C. (L. Canada), art 1030; Code Nap. art. 1122.

Bompas, Q.C., *Jeune*, Q.C., and *Ronin*, Q.C. (Canada), for the respondent, were not heard.

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July 27.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

In this case their Lordships are of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

It appears that, on the 31st of January, 1880, one Pangman deposited with Senécal fifty-four debentures of the Laurentian Railway Company of the nominal value of $500 each as collateral security for the payment of two promissory notes of the same date of $1000 each, payable the one ten months and the other twelve months after date.

On the 11th of November, 1880, Pangman died insolvent. His heirs renounced the succession, and the respondent Pauzé, one of his creditors, was duly appointed curator to his vacant estate.

(1) 17 L. C. R. 168.

On the 6th of April, 1882, Pauzé tendered to Senécal the sum of $2152, the amount then due in respect of the two promissory notes, and demanded a return of the debentures.

Senécal refused to comply with this demand; Pauzé then brought the present action to recover the debentures, repeating his tender.

The Superior Court (Papineau, J.) gave judgment for the plaintiff, and ordered Senécal to restore the debentures, or in default to account for their par value. This judgment was however reversed by the Court of Review on the ground that the tender was insufficient. On appeal, the Court of Queen's Bench, Monk and Tessier, JJ., dissenting, set aside the judgment of the Court of Review, and restored the judgment of the Superior Court, with some variations of no great importance. From this decision Senécal appealed to Her Majesty in Council, and on Senécal's death in October, 1887, his widow was substituted as appellant in his place.

On behalf of the appellant it was argued that the judgment under appeal ought to be reversed and the action dismissed on two grounds.

In the first place, it was contended that the tender was insufficient, and that, consequently, the action could not be maintained.

In dealing with this point, Dorion, C.J., observes that this defence was not pleaded, and that the Court of Review decided a question which was not in issue. In these observations their Lordships concur.

The learned counsel for the appellant relied upon art. 1975 of the Civil Code of Lower Canada, which provides in reference to a thing pledged as security for a specific debt that "If another debt be contracted after the pledging of the thing, and become due before that for which the pledge was given, the creditor is not obliged to restore the thing until both debts are paid." In connection with this article they pointed out that it was established in evidence, and not, in fact, disputed, that other debts had been contracted and did become due during the currency of the promissory notes, and they argued that it was incumbent on Pauzé to tender a sum sufficient to cover the amount of this

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indebtedness, as well as the principal and interest secured by the promissory notes. In this view their Lordships cannot agree. As the learned Chief Justice observes, Pauzé complied strictly with the terms of the contract of deposit by tendering the amount due in respect of the promissory notes. Senécal, no doubt, might have claimed to hold the debentures until both debts were paid if he had been prepared to restore the debentures. It appears, however, that he had either parted with them already or was fully resolved at the time to treat them as his own property; he had no intention of restoring them in any event. In these circumstances, though he alleged that other sums were due to him from Pangman's estate, he did not set up by way of defence the right which art. 1975 gives to the holder of a pledge. Obviously he could not have done so honestly.

The first ground of appeal therefore fails.

In the next place it was contended that Pangman had come under a contract to sell forty-eight of these debentures for $1400 to one Greene, who was engineer-in-chief of the Laurentian Railway during its construction; that Greene had transferred his rights to Senécal for valuable consideration; and that Senécal was consequently entitled to hold all but six as his own, giving credit for their stipulated price. The balance of Senécal's claims on Pangman's estate might be set off against the remaining six debentures.

The facts upon which this contention was founded are as follows.

The Laurentian Railway Company was incorporated by Act 36 Vict. c. 44, of the legislature of Quebec, for the purpose of constructing a railway about fifteen miles long in the Province of Quebec. The company was authorized to issue debentures, hypothecating its property and revenue to the extent of $300,000. In 1876, Pangman being then President and one Bellefeuille being secretary of the company, debentures to that amount were issued in order to provide funds for the construction of the railway. The debentures were secured by a trust deed, which gave the holder or holders of debentures to the value of $50,000 the right to set the trustee in motion in case of default on the part of the company.

In 1878 the line seems to have been completed and in working order, but the receipts were certainly not more than sufficient to pay the working expenses, and the credit of the company was at a very low ebb.

On the 13th of September, 1878, the following document was signed by Pangman and the other persons whose names are subscribed to it:—

"We, the undersigned, hereby agree to accept from N. H. Greene the amount set opposite our respective names, in full payment for all salaries and services in connection with the Laurentian Railway; we agree to deliver to said Greene all Laurentian Railway debentures received from said company, and transfer all shares of stock in said company held by us on payment of the respective amounts shewn opposite our respective names herein below:—

Names.	Amounts of Debentures.	Amount of Cash to be paid.	Signature.
	$	$ c.	
J. H. Pangman . .	24,000	1,400 00	J. H. Pangman.
Hon. J. A. Chapleau .	20,000	1,400 00	J. A. Chapleau.
P. S. Murphy . .	16,000	1,600 00	P. S. Murphy.
E. L. de Bellefeuille .	16,000	1,000 00	E. L. de Bellefeuille.
N. H. Greene . .	—	—	—

"In the above arrangement I waive my claim for all other debentures that may be due me, as well as any claim for travelling expenses or otherwise, and do hereby transfer the same to Mr. N. H. Greene, without, however, any guarantee as to amount or legality of my aforesaid claim.

"P. S. MURPHY,
"13th Sept. 1878.

"Montreal, 13th Sept. 1878."

At the trial Senécal's counsel resisted, and resisted successfully, every attempt that was made on the part of the plaintiff to explain the circumstances under which this document was executed, and the purpose for which it was placed in Greene's hands.

It does not appear that Greene took any action upon the document until March, 1882.

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On the 13th of March, 1882, a conditional agreement was made between the Laurentian Railway Company, of which Senécal was then President, and the Canadian Pacific Railway Company, for the purchase by the latter of the Laurentian Railway, in consideration of the Canadian Pacific Company redeeming the $300,000 debentures of the Laurentian Railway Company.

About this time Greene seems to have called upon Murphy and Bellefeuille, two of the persons who subscribed the document of September, 1878, to transfer their debentures for the sums therein mentioned. They both refused to do so, and no proceedings were taken to enforce the claim. About the same time Greene wrote upon the document an acceptance in the following terms, "I accept the above agreement, N. H. Greene," and upon the 10th of April, 1882, by a memorandum on the document, he purported to assign for value his rights under it to Senécal.

The conditional agreement for the purchase of the Laurentian Railway was confirmed by the Act 45 Vict. c. 19, which received the Royal assent on the 12th of May, 1882.

Treating the document of September, 1878, as an offer by Pangman to sell $24,000 debentures of the Laurentian Railway Company to Greene for $1400, Dorion, C.J., observes that the acceptance by Greene was written long after Pangman's death, and never notified to Pangman, but only to the curator of his estate, after the institution of this action. His conclusion was that no contract binding the estate could then be formed, first, because Pangman was dead, and secondly, because his estate was insolvent.

The learned counsel for the appellant argued that no formal acceptance by Greene was required, because the agreement was proved to have been executed at his request. They contended that so long as the debentures, the subject of the agreement between Pangman and Greene, were in the possession of Pangman or his legal representatives, it was open to Greene or his assignee, at any time however remote, to enforce specific performance of the agreement, though admittedly at best a unilateral contract, and differing from a "simple pollicitation" merely by reason of its having been executed at Greene's instance.

Upon this point their Lordships do not think it necessary to

express any opinion, beyond saying that the passages from modern French writers cited by the learned counsel for the appellant—passages which are certainly not easy of application or altogether free from perplexity—have not convinced them that there is any error or oversight in the conclusion of the learned Chief Justice, who prefaces his opinion by observing that "the law applicable to the facts established in the case does not admit of any controversy."

Their Lordships, however, are disposed to take a somewhat different view of the document in question.

Having regard to the condition of the Laurentian Railway Company at the time, the position of the persons who signed the document, the nature of their claims, and the terms of the document itself, and not perhaps quite overlooking the anxiety displayed by Senécal at the trial to exclude everything which could throw light upon the circumstances under which it was executed, their Lordships cannot resist the conclusion that the document of September, 1878, is not to be regarded as an unilateral agreement binding the signatories for an indefinite time to sell their debentures to Greene at a certain price, but that it was an arrangement made between persons having a common interest in the Laurentian Railway Company for the purpose of defining and limiting their respective claims against the company, and that it was placed in Greene's hands in order to facilitate some financial operation in regard to the railway which was then on foot or in the immediate contemplation of the parties, and intended for their common benefit,

If this be the true view it appears to their Lordships that it was not competent for Greene to make use of the document contrary to the real intention of the parties, and to treat it as an agreement for sale of which he might avail himself for his own benefit whenever he chose. The second ground of appeal therefore fails also.

It was contended, lastly, by the learned counsel for the appellant that the judgment under appeal is wrong in treating the debentures as worth their par nominal value.

It was said that the respondent himself in these very proceedings originally estimated them at 50 per cent. of their nominal

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value, and that before the sale to the Canadian Pacific Company they were certainly not worth so much. All this is very true. But the question is, not what they were worth then but what would be their value now. There seems to be no reason why they should be taken at less than their nominal value.

It is by no means clear that Senécal did not get their nominal value from the Canadian Pacific Railway Company. He was examined at the trial. He said he sold Pangman's debentures, either to the Laurentian Railway Company or to the Canadian Pacific; he could not remember which. When the sale was made, and what he got for them, he professed to be unable to state. He was asked in so many words whether he sold them for their nominal value. He did not answer in the negative. All he would say was, "I cannot tell for what price I sold them; I cannot say what I got for them. It was mixed up with other transactions."

Besides, if these debentures were now forthcoming they would either be a first charge on the undertaking of the Laurentian Railway or not. In the one case it is obvious that the Canadian Pacific Company would pay the par nominal value rather than submit to a sale of a property which their own manager says it was necessary for them to buy in connection with their main line. On the other hand, if the effect of the Act 45 Vict., c. 19, is that the charge on the railway is displaced, the rights of unpaid debenture holders against the Laurentian Railway Company, for what they might be worth, would still remain. There is no reason for assuming that the Laurentian Railway Company would expose themselves to legal proceedings rather than call on the Canadian Pacific Company to carry out the terms of their bargain with them and redeem their outstanding debentures.

In the result their Lordships are of opinion that the appeal fails on every ground.

They will, therefore, humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal.

Solicitors for the appellant: *Simpson & Co.*
Solicitors for the respondent: *Freeman & Bothamley.*

[PRIVY COUNCIL.]

GILMOUR AND OTHERS . . . . . DEFENDANTS; J. C.*

AND 1889

MAUROIT . . . . . PLAINTIFF. June 27, 28; July

AND

GILMOUR AND OTHERS . . . . . DEFENDANTS;

AND

ALLAIRE . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Law of Canada—Public Lands Act of 1869, *s.* 16—*Rights of Holder of Location Ticket—Timber-cutting Licences.*

Where the plaintiffs had obtained a location ticket from the Crown of lands within the ambit of a forest reserve proclaimed by the Crown under the Forest Act of 1883, which prohibited any grant of them by the Crown:—

Held, that, under sect. 16 of the Public Lands Act of 1869 (32 Vict. c. 11), the Plaintiffs were in possession of land for valuable consideration given by them to the Crown, and (whatever the infirmities of the Crown's title) had a right under the Injunction Act of 1878 to be protected against the defendants who held a timber-cutting licence from which the plaintiffs' land was excepted.

APPEAL from two judgments of the Court of Queen's Bench (Sept. 23, 1887), affirming in part two judgments of the Superior Court of the Province of Quebec (Feb. 24, 1887).

The facts are stated in the judgment of their Lordships.

Irvine, Q.C. (Canada), and *Fleming*, Q.C. (Canada), for the appellants.

Bompas, Q.C., *Fullarton*, and *Bochon* (Canada), for the respondent.

* *Present:*—THE LORD CHANCELLOR (LORD HALSBURY), LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

GILMOUR AND OTHERS v. MAUROIT.

In this case the Superior Court issued an order enjoining the defendants, who are the now appellants, to discontinue and cease all lumbering and other works in connection therewith on certain lots of land in the possession of the complainant, who is the now respondent.

The defendants appealed to the Court of Queen's Bench, who issued the order now appealed from. It is in the following terms :—

"Considering that the respondent has established that on the 21st day of April, 1886, he has obtained from the Crown Lands Agent, acting for and on behalf of the Government of the Province of Quebec, a location ticket for lots Nos. 62 and 63 in the 6th range of the township of Egan, in the District of Ottawa, and had possession of the said lots of land when the act of trespass complained of by him was committed by the appellants;

"And considering that, by the licence granted to the appellants to cut timber on the lands therein described, all lots or parts of lots for which a patent or a location ticket had previously been granted were excluded from the operation of the said licence;

"And considering that the respondent has established that he had a primâ facie title to the possession and property of the said lots of land, such a location ticket being a promise of sale from the Government of the Province of Quebec, on the conditions determined by law, with possession, which entitled the said respondent to claim and obtain an injunction enjoining the appellants, who having no title to cut timber on the said lots of land are by law considered as having cut by trespass the timber mentioned in the respondent's petition, until the said appellants had established in the regular course of law the insufficiency of the respondent's title and their right to cut the timber on the said lots of land;

"And considering that there is no error in the judgment rendered on the 24th day of February, 1887, by the Superior

Court for the District of Ottawa, sitting at Aylmer, except in the expression that the writ of injunction issued in this cause was declared to be perpetual, which might exclude the appellants from hereafter asserting in due course of law their right to cut the timber on the said lots of lands;

"This Court, for the above reasons, doth maintain the said writ of injunction, and doth enjoin the said Allan Gilmour, John Gilmour, David Gilmour, and John David Gilmour, defendants below, now appellants, to discontinue and cease all lumbering and all operations and works in connection therewith on said lots Nos. 62 and 63 of the sixth range of the township of Egan, in the District of Ottawa, now in possession of the respondent, under and in virtue of a location ticket granted to him, and bearing date 21st April, 1886, under the penalties ordained and prescribed by law."

The defendants complain, first, that the injunction, though not intended to be perpetual, is in fact made so, and that they are excluded from hereafter asserting any right to cut timber on the land in question. It is true that the mandatory part of the order is indefinite in point of time, and if unexplained might be read as being perpetual, but taken in connection with the expressed motives it is plain enough that if the defendants have a better title to assert they may do so in a proper suit.

The principal contention of the defendants is that the plaintiff has not shewn any valid title to the land, and in order to shew the precise bearing of this contention the positions of the parties must be stated.

The plaintiff claims title under a licence of occupation, commonly called a location ticket, granted to him on the 21st of April, 1886, by the agent of Crown lands. The licence states that the plaintiff has paid $12, being one-fifth of the purchase-money of 200 acres of land contained in lots Nos. 62–63, in the township of Egan, the balance being payable in four equal annual instalments. The grantee is bound to take possession within six months, to continue residence and occupation for two years at least, to clear or cultivate at least ten acres in the 100, and to build a habitable house of a certain size. Before his patent is issued he is not to cut wood except for clearance, fuel,

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building, or fences. The sale is expressly made subject to all timber licences actually in force.

By sect. 16 of the Public Lands Act of 1869 (32 Vict. c. 11), such a licence gives to the grantee a right to take possession of and occupy the land therein comprised, and to maintain suits in law or equity against any wrongdoer or trespasser, as effectually as he could do under a patent from the Crown, and such licence is to be primâ facie evidence of possession in any such suit, but is to have no force against a licence to cut timber existing at the time of the granting thereof.

From the 4th of December, 1885, to the 30th of April, 1886, the defendants held a licence to cut timber over a tract of land roughly speaking about fifty square miles in extent, which embraced lots 62–63, in the township of Egan. This licence contained a proviso that all lots sold or located by the authority of the Commissioners of Town Lands should cease to be subject to it after the 30th of April following. Probably the reason for inserting a clause exempting located lots at a date after the expiry of the licence was that such licensees had claims to renewal of their licences which were recognised by the Crown officers.

The operations which led to this suit were commenced by the defendants on the 15th of October, 1886. A few days later a new licence dated the 23rd of October was granted to the defendants over the same tract of land, but with the condition that all lots sold or located by the authority of the Commissioners of Crown Lands prior to that date are to be held as exempted from the licence.

The defendants contend that the plaintiff's lots do not fall within the description of "lots sold or located by the authority of the Commissioners of Crown Lands," because, though they were so sold or located ostensibly, and by the district agent, and apparently in the course of official business, yet the commissioner had no legal authority to make such a grant. The Forest Act of 1883, which enables the Crown to set apart ungranted land as forests, prohibits the sale of them till after a period of ten years. The plaintiff's lots are within the ambit of a large territory set apart as forest reserve by a proclamation dated 23rd of August,

1883; therefore, say the defendants, the Crown was incapable of granting them in 1886.

The plaintiff met this objection to his title by contending first that the proclamation was itself invalid, and then that his lots fell within certain exceptions from the forest reserve which the proclamation specifies. On these points there has been much controversy. The Superior Court rested its decision partly on the ground that the proclamation was invalid. The Court of Queen's Bench do not either in the motives of their judgment, nor in the reasons assigned by the majority of the judges, take any such ground. They pronounce no opinion on the matter. And it appears to their Lordships also that the controversy is immaterial for the decision of the present question.

That question is whether the plaintiff is a person who as against the defendants has a right to be protected by injunction within the terms of the Injunction Act of 1878. The Act provides that the Court may grant a writ of injunction ordering the suspension of any act, proceeding, operation, work of construction or demolition, in the following case amongst others:—"Whenever any person who has not acquired the possession of one year, and who has no valid title to the property, causes work to be carried on upon any land whereof another is proprietor through a valid title, and of which he is in lawful possession."

The defendants have certainly never had the possession contemplated by the Act, and their Lordships agree with the holding of the Queen's Bench, that all lots for which a location ticket had previously been granted were excluded from the operation of the timber licence granted to the defendants in October, 1886. The defendants therefore had neither possession nor title.

The plaintiff is in possession for valuable consideration given by him to the Crown, in the course of dealings with the official agent of the Crown, and ostensibly by the authority of that agent. Even supposing that the Crown can annul the instrument which gives him title, it could not treat him as a trespasser. Nor whatever may be the legal powers of the Crown, as to which their Lordships say nothing, can we consider as a mere nullity the possession of land by one who has paid money for it, and has made improvements on it, and who can hardly be expected to

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know of legal infirmities in the Crown's title. Their Lordships consider that this is a title sufficiently valid and a possession sufficiently lawful to carry with it the right of protection by injunction; and that the Injunction Act does not open to a defendant a door of escape merely because he may be able to shew that the plaintiff's title is one which cannot be made good against all other persons.

From the statement of reasons by the learned Chief Justice their Lordships collect that the Court will not, as a general rule, decide a question of title on this kind of proceeding, especially when a third party is interested as the Crown is here, but that they are in the habit of granting interim protection. It appears to their Lordships that such a practice is in accordance with the provisions of the Act, and has been properly applied in the present instance.

Their Lordships think that the appeal ought to be dismissed with costs.

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This appeal is subject to the same considerations, the only difference being that the plaintiff's location ticket was granted before the proclamation of September, 1883, and before the defendants obtained any timber licence at all. Therefore the arguments used to prove the invalidity of Mauroit's title do not apply to Allaire's. This appeal also should be dismissed with costs.

BOTH APPEALS.

Their Lordships will humbly advise Her Majesty in accordance with the foregoing opinions.

Solicitors for appellants: *Wainwright & Baillie.*
Solicitors for respondent: *J. & C. Robinson & Wilkins.*

[PRIVY COUNCIL.]

FARNUM . . . . . PLAINTIFF;

AND

ADMINISTRATOR-GENERAL OF BRITISH GUIANA . . . . . DEFENDANT.

AND

WILLEMS AND WIFE . . . . . PLAINTIFFS;

AND

ADMINISTRATOR-GENERAL OF BRITISH GUIANA . . . . . DEFENDANT.

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July 12, 13, 25.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

Law of British Guiana—Will—Construction—Power of substituting Executors.

The testator by his will appointed four persons therein named (the two last taking in succession), to be executors for the purpose of discharging his debts and paying legacies, and administrators (with all the powers by law and custom incident to that office) of his residuary estate, giving and granting to them all certain powers therein described, and "also the powers of assumption, surrogation, and substitution to any of them, to the two last surviving of them, and to any by them assumed, surrogated, and substituted for the purposes aforesaid":—

Held, that the plain intention of the testator was to provide for the continuous management of his estate by a series of private administrators, and to give a power of substitution to the two last survivors of the said four persons. Consequently the nomination of the Administrator-General by one who was not one of the two last survivors was null and void as being contrary to the terms of the will.

CONSOLIDATED appeals from decrees of the Supreme Court (Jan. 6, 1888).

The subject matter of these appeals was the estate of H. M. A. Black, deceased, and the principal question raised was whether or not a certain act of substitution executed by John Moore, as one of the executors of Black, on the 29th of June, 1887, substi-

* *Present*:—LORD WATSON, LORD BRAMWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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tuting the respondent as executor and administrator of the estate in question in his place and stead, was valid.

The facts of the case and the clauses of the will are set out in the judgment of their Lordships.

Rigby, Q.C., and *Levett*, for the appellants, contended that under the 13th clause of the will Moore had no power to substitute the respondent for himself as executor, administrator, and guardian. Farnum was willing and qualified to act, and could not be deprived of his authority so to do. He became executor, administrator, and guardian under the 13th clause in place of Moore, whose act of substitution at all events operated as a resignation of his own appointment, and as a refusal to act any further therein. The words "to the two last surviving of them" in the 13th clause cannot be rejected as surplusage. They operate to restrict the right of substitution to the survivors of the four persons named. Reference was made to *Letterstedt* v. *Broers* (1); *Travis* v. *Illingworth* (2).

Sir *Horace Davey*, Q.C., and *Fryer* (*Green* with them), for the respondent, contended that the notarial act of the 29th of June, 1887, by which the respondent was substituted as executor, was valid and effectual. According to the law of British Guiana a testator may give power to his executors to substitute others in their places. By the true construction of this will the testator gave power to the instituted executors to substitute others in their places. This power was a joint and several power. Accordingly Moore was empowered to appoint the respondent; and to nullify that appointment was to reinstate Moore. Reference was made to Van Leeuwen's Roman-Dutch Law (Kotze's translation), vol. i. pp. 372, 374.

Rigby, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON:—

These consolidated appeals involve the construction of the administrative clauses in the last will and testament of Henry

(1) 9 App. Cas. 390. (2) 2 Dr. & Sm. 344.

Marius Alexander Black, who died in Europe on the 2nd of September, 1886. The testator, at the time of his death, was domiciled in British Guiana, and the instrument, which was executed in Demerara on the 6th of April, 1886, must be construed according to the law of the Colony,

By the first clause of the will, the testator expresses his desire that his debts and funeral expenses be paid as soon as possible after his death. By the third, fourth, fifth, sixth, and eighth, he bequeaths a number of pecuniary and other legacies. By the seventh he bequeaths an annuity of $300 to Lucretia Johanna Cobrian, the mother of his natural children; and by the ninth he leaves and bequeaths the residue of his estate to his three natural daughters, two of whom were in minority, "nominating and constituting them my universal heiresses and residuary legatees." The tenth, eleventh, and twelfth clauses express his wishes with respect to the realization of certain immoveable estate in the Colony.

The testator then provides for the administration of his estates by the 13th clause, which is in these terms: "I nominate, constitute, and appoint as executors to this my last will and testament, as administrators of the annuity made and bequeathed to the said Lucretia Johanna Cobrian, and as guardians of my minor heiresses and legatees, *and as administrators of the property made and bequeathed to my heiresses and residuary legatees for the purposes herein stated*, the said Edward George Barr and John Moore, jointly and severally; and in case of the death, refusal, or inability to act of either of them, then I nominate, constitute, and appoint in the place of any one of them so dying, refusing, or being unable to act, John Parry Farnum, the younger, of this Colony; and in case of both dying, refusing, or being unable to act, then I nominate, constitute, and appoint the said John Parry Farnum, the younger, and Samuel Augustus Harvey Culpeper, also of this Colony, jointly and severally, giving and granting to them all such ample power and authority as are granted by law or custom to executors, administrators of annuities, *and to guardians and administrators of funds and properties belonging to heirs and residuary legatees*, especially the right to sell, convey, transport, and to make over immoveable, moveable, and other

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property, bank shares, insurance scrip, debts, securities of all kinds, mortgages, or otherwise belonging to me, or to which I may be entitled at the time of my death, *and also the powers of assumption, surrogation, and substitution to any of them to the two last surviving of them, and to any by them assumed, surrogated, and substituted for the purposes aforesaid.*" Upon this clause the observation occurs that the testator confers a variety of offices upon the persons therein named. He first appoints them to be executors, in which capacity he apparently intended that they should discharge his debts and pay and make over legacies. But it does not appear that he intended them to exercise that office with respect to the remainder of his estate. On the contrary, he expressly nominates them to be "administrators" of the annuity payable to Lucretia Johanna Cobrian, and also of the residue bequeathed to his three daughters: and in relation to that part of his estate he gives them such power and authority as are granted by law or custom to "administrators of funds and properties belonging to heirs and residuary legatees."

It is necessary to refer in this connection to the terms of the second clause of the will, by which the testator leaves to each of his executors, guardians, and administrators after-named the sum of £100 sterling, "in full of all commission to which they might otherwise be entitled by law or custom." The legal allowances to the executors and administrators would have been considerably in excess of the sum which he fixes as remuneration for their services; and in case of the failure of the administration provided by the will, the management of his estates would have been assumed by the Administrator-General of the Colony, an officer of Court acting, at the date of the will, under the Colonial Ordinance No. 8 of 1865, whose fees would have been higher still. There can be little doubt that it was the purpose of the testator to secure private administration at a cheap rate, and to avoid if possible official administration and official fees.

Edward George Barr and John Moore accepted office, and took possession of the whole property of the testator. Barr resided in England, but was represented by Moore until the latter quitted the Colony on the 9th of July, 1887. On the 29th of June, 1887, Moore, professing to act under the powers conferred upon

him by the thirteenth clause, and on the narrative that he was about to leave the Colony "for good," executed a notarial act, by which he substituted the Administrator-General of British Guiana, the respondent in these appeals, to be in his place and stead an executor, guardian, and administrator under the will. The Colonial Ordinance No. 15 of 1887, which was passed by the Governor and his Court of Policy on the 25th of May, came into operation on the 1st of July, 1887. Sect. 12 enacts that "No testamentary executor or guardian having the power of substitution or surrogation shall substitute or surrogate the Administrator-General without leave of the Court, and if any such substitution or surrogation be executed without leave of the Court, the same shall be void and of no effect." There being no time to lose, the respondent, on the 30th of June, 1887, made an inventory of the testator's estate and effects in the Colony which constituted the residue of the estate, and took and still holds possession of the same, in virtue of Moore's appointment. Barr has never indicated any intention to withdraw from the administration, and has, as their Lordships were informed by the parties at the bar, granted a power of attorney to a resident in the Colony, empowering the latter to act as his representative. Since he executed the notarial act of the 29th of June, 1887, Moore has been out of the Colony, and has admittedly taken no part in the administration of the estate.

On the 22nd of July, 1887, the appellant John Parry Farnum and Samuel Augustus Harvey Culpeper, two of the persons named in clause 13 of the will, presented a petition to the Supreme Court of the Colony, praying to have Moore's act substituting the respondent declared to be null and void, to have themselves declared to be the true and lawful executors, guardians, and administrators under the will, and also that the respondent should be directed to cease administering or interfering with the estate of the testator, and to hand over the whole estate to them, "without any deduction whatever for fees or otherwise."

On the 3rd of November, 1887, the appellants, Pierre Jacques Willems, and his wife, the eldest of the three residuary legatees, who was married before the date of the will, presented a petition to the same tribunal, craving an order upon the respondent to

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deliver to them a proper account of the estate then in his hands, and to make payment to them of £1000 to account of the lady's share of residue, on the ground that it was payable at the testator's decease. They alleged that the substitution of the respondent by Moore was invalid, and that the administration of the respondent was without title. The main object of the application was to have it found that, in settling the lady's share of residue, the respondent was not entitled to take credit for the large fees payable to him as Administrator-General under the ordinance of 1865.

The respondent resisted both petitions, on the ground that he was duly appointed to the offices of executor and administrator, and had therefore right not only to hold and manage the estate but to charge for its administration the usual fees exigible by him in his official capacity. He also pleaded, in defence to the petition at the instance of the appellants Willems and his wife, that the lady's share of residue was not payable until her youngest sister attained majority or married. The Supreme Court, consisting of Chief Justice Chalmers, Judge Sheriff, and Acting Judge Kirke, on the 6th of January, 1888, disposed of both petitions by refusing the prayer thereof and ordering the costs of all parties to be paid out of the testator's estate. In the petition at the instance of Farnum and Culpeper the Chief Justice differed from his brethren, holding that, according to the true construction of clause 13 of the will, Moore had no power to substitute the respondent in his room and stead. That point having been determined against his opinion in the first case, the learned Chief Justice in the second acquiesced in the judgment of the majority.

It appears to their Lordships to have been the plain intention of the testator to provide, by the thirteenth clause, for the continuous management of his estate by a series of private administrators, notwithstanding the failure by death, declinature, or otherwise of those who had entered upon office and acted. The considerations in favour of that view, which are apparent on the face of the instrument, are substantially the same with those which were given effect to by Kindersley, V.-C., in *Travis* v. *Illingworth* (1). The testator names four persons of his own

(1) 2 Dr. & Sm. 344.

selection in whom he reposed confidence. Two of these are preferred in the first instance, that is to say Barr and Moore; on the failure of one of them, he puts the appellant Farnum in his place; and on the failure of both, Farnum and Culpeper are appointed their successors. So far, the meaning of the clause is not doubtful; but the testator then proceeds, after conferring ample administrative powers, to make provision against the possible failure of the persons he had previously named, by giving in addition powers of assumption, surrogation, and substitution. The real question to be determined in these appeals is, who are the donees of the power of substitution? The Chief Justice was of opinion that the sole donees of the power are the two last surviving of the four persons named by the testator; whereas the majority of the Court seem to have held that the power was given to all the accepting and acting executors and administrators jointly and severally, so that Moore, as one of them, could competently substitute the respondent.

All the judges in the Court below held that the words "to any of them to the two last surviving of them" apply to the same subject matter, the majority being of opinion that they are applicable to and descriptive of the donees of the power. The Chief Justice said that he could not divorce the words "to any of them" from the immediately succeeding words "to the two last surviving of them." On that assumption a serious ambiguity arises, which the Chief Justice has solved by denying effect to the first of these expressions, and his colleagues by treating the second as meaningless. Their Lordships do not think that the language of the testator, when fairly construed, raises the ambiguity which has been so elaborately and learnedly discussed in the Court below. In their opinion it is obvious that the testator used the first expression with reference to the faculty he was conferring, and the second with reference to the persons upon whom he meant to confer it; and that the sentence must be read just as if it had run thus, "giving and granting" . . . "to the two last surviving of them, the powers of assumption, surrogation, and substitution to any of them." That reading does no violence to the context; it attributes a meaning to every word in the sentence, and fits into, instead of subverting, the general scheme

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which the testator has previously framed for continuing the future administration of his estate. Moore was not, in June, 1887, one of "the two last surviving of them" within the meaning of the will, and he had therefore no power to confer any administrative office upon the respondent.

It was urged for the respondent that, according to the Roman-Dutch law, which prevails in the Colony, Barr and Moore were executors and that upon their acceptance of office the nomination of Farnum and Culpeper became inefficacious. Coming from such a quarter the argument was a very singular one, because, if pushed to its logical consequences, it would not only deprive Farnum and Culpeper of the right to take up the administration in the events provided by the testator, but would invalidate the substitution by Moore of the respondent himself. But in truth the argument rests upon the fallacious assumption that the office conferred by the testator in clause 13 is that of executor in the sense in which the term is understood in the law of England. The Roman law did not recognise the office of executor; the *hæres institutus* was a true heir, although he might be burdened with legacies and *fidei commissa*. This Board had occasion, in the recent case of *De Montmort* v. *Broers* (1), to explain that, according to Roman-Dutch law, the executors of a testament are in reality procurators, and that their powers in relation to the estate falling to the testator's heirs, are merely those of management. That such is the law of British Guiana appears from a judgment delivered, in the year 1861, by a former Chief Justice (Arundell) of the Colony which is printed in the papers before us. He states the law of the Colony to be that "the authority of the executors is derived from the will of the testator, which governs and defines the limits of that authority;" and in the case before him he held, in respect of the intention of the testator, as appearing from the text of his will, that the appointment of executor was more of the nature of an attorney or administrator than of a pure executorship. In the present case, the testator has not left in doubt the nature of the office which he meant to confer upon the persons named in clause 13 of the will. He specially constitutes them "administrators" of the property bequeathed to

(1) 18 App. Cas. 154.

the residuary legatees, and gives them all the powers by law or custom incident to that office.

The only other argument of the respondent deserving of serious notice was to the effect that the appellant Farnum cannot prevail in his petition, because the legal effect of declaring his act of substitution void will be to reinstate Moore in office. To that proposition their Lordships are unable to assent. Moore's act of substitution was not merely equivalent to a representation that he was unwilling or unable to continue to administer, but was an actual demission of his office. It was also suggested, in the course of the respondent's argument, that Moore ought to be made a party to these proceedings before any decree can be pronounced ordaining the respondent to make over the estate and its titles and vouchers to the appellant Farnum. The plea, which ought to have been stated *in limine*, comes somewhat late; but their Lordships do not see what object could have been gained by Moore's appearance, except that he might now have been subjected to the expenses occasioned by a gross breach of trust on his part.

Seeing that the appellant Farnum is now the only qualified administrator resident in the Colony where the estate is situated, the fact that Barr, who is resident in England, also claims to share in the administration can be no impediment to a decree ordaining the respondent to transfer to him in terms of the prayer of his petition. There is no charge of malversation made against the respondent, and he will therefore be entitled, in accounting for the estate, to deduct all outlays necessarily and properly incurred by him; but he will not be entitled to any official fees or to remuneration for personal services in the administration of the estate, which he illegally took possession of, and has wrongfully withheld from those entitled to it.

In the petition at the instance of the other appellants the question as to the time at which Mrs. Willems' share of residue became payable under the will has ceased to be of any practical consequence, because her youngest sister attained majority in January, 1889.

In these circumstances their Lordships will humbly advise Her Majesty to reverse the judgment appealed from in each of

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these cases; in the petition of the appellant Farnum and Culpeper, to declare the act of substitution by John Moore to be null and void, as being contrary to the terms of the will, and to ordain the respondent, the Administrator-General of the Colony, forthwith to transfer and deliver to the said appellant the whole estate of the testator, with the accounts and vouchers thereof, and also to pay to the said appellant and Culpeper their costs in the Court below; and in the petition at the instance of the appellants Pierre Jacques Willems and his spouse, to declare the substitution of the respondent by John Moore to be null and void, to find it unnecessary to pronounce any further deliverance, and also to find neither of the parties to the said petition entitled to their costs in the Court below. The respondent must pay the cost of these appeals.

Solicitors for appellants: *Lewis & Lewis.*
Solicitors for the respondent: *Champion & Sons.*

[PRIVY COUNCIL.]

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July 27.

LA CITE DE MONTRÉAL . . . . . APPELLANT;

AND

LES ECCLÉSIASTIQUES DU SEMINAIRE DE ST. SULPICE DE MONTRÉAL . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Practice—Special Leave.

Petition for special leave to appeal from a judgment of the Supreme Court of Canada exempting the respondents from payment of a tax specially assessed by the appellant corporation, refused; the exemption being under statute which the judgment did not appear to have construed erroneously.

Although a case may be of substantial character, and may involve matter of great public interest, and may raise an important question of law, yet the judgment sought to be appealed from may be plainly right or unattended with sufficient doubt to justify special leave being granted.

Prince v. *Gagnon* (8 App. Cas. 103) considered.

THIS was a petition for special leave to appeal from a judgment of the Supreme Court of Canada under the circumstances

* *Present:*—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

stated in the judgment of their Lordships on the ground that the question at issue involved matter of considerable public interest and importance and affected property of very large amount. That question, it was further contended, involved the future liability of buildings set apart for purposes of education or of religious worship, parsonage-houses, and charitable and educational institutions and hospitals, to contribute to local improvements carried out in their interests and for the benefit of their properties. It was further contended that it involved the liability of the petitioners to repay large sums which had been paid to them in respect of assessments similar to that which was the subject of this action.

Rigby, Q.C., *Roy*, Q.C. (Canada), and *Pauli*, for the petitioners.

The judgment of their Lordships was delivered by

LORD WATSON:—

This is a petition at the instance of the municipal corporation of the city of Montreal, for leave to appeal from a judgment of the Supreme Court of Canada, by which the seminary of St. Sulpice, which is within the boundaries of the city, has been exempted from payment of a sum of $361. 90, about £70 sterling, being the proportion charged upon it, by the petitioners, of a special assessment made by them for the cost of constructing a main drain which runs in front of its premises. The Supreme Court, by a majority of four to one (Ritchie, C.J., being the dissentient judge), reversed the decision of the Queen's Bench for Lower Canada, which was also pronounced by a majority of four to one, and restored the judgment of Loranger, J., the judge of first instance.

In considering applications of this kind, it is necessary to keep in view that the statute of Canada, 38 Vict. c. 11, which established the Supreme Court of the Dominion, does not give to unsuccessful litigants a direct right, either absolute or conditional, to appeal from the decisions of that tribunal. Sect. 47 expressly declares that no appeal shall be brought from any judgment or order of the Supreme Court to any Court established by the Parliament of Great Britain and Ireland by which appeals or

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petitions to Her Majesty in Council may be ordered to be heard; but saves any right which Her Majesty may be graciously pleased to exercise by virtue of her Royal prerogative.

It is the duty of their Lordships to advise Her Majesty in the exercise of her prerogative, and in the discharge of that duty they are bound to apply their judicial discretion to the particular facts and circumstances of each case as presented to them. In forming an opinion as to the propriety of allowing an appeal, they must necessarily rely to a very great extent upon the statements contained in the petition with regard to the import and effect of the judgment complained of, and the reasons therein alleged for treating it as an exceptional one, and permitting it to be brought under review. Experience has shewn that great caution is required in accepting these reasons when they are not fully substantiated, or do not appear to be primâ facie established by reference to the petitioner's statement of the main facts of the case, and the questions of law to which these give rise. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and an attempt to formulate any such rule might therefore prove misleading. In some cases, as in *Prince* v. *Gagnon* (1), their Lordships have had occasion to indicate certain particulars, the absence of which will have a strong influence in inducing them to advise that leave should not be given, but it by no means follows that leave will be recommended in all cases in which these features occur. A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal.

The exemption which the Supreme Court has sustained in the present instance is a statutory one. The petitioners narrate the 77th section of the Consolidated Statutes of Lower Canada, cap. 15, and then proceed to allege that the effect of the judgment will be

(1) 8 App. Cas. 103.

"to determine the future liability (meaning apparently non-liability) of buildings set apart for purposes of education, or of religious worship, parsonage-houses, and charitable and educational institutions and hospitals, to contribute to local improvements carried out in their interests and for the benefit of their properties." Had that statement been well founded, it might have been an important element in considering whether leave ought to be given. But it is plainly erroneous. The statute in question, which relates to "public education," exempts the properties above enumerated from educational rates levied for the purposes of the Act, and from no other rates.

The clause upon which the judgment of the Supreme Court proceeded is sect. 26 of the statutes of the Province of Quebec, 41 Vict. c. 6, which is an Act to amend the laws respecting public instruction. It enacts that "Every educational institution receiving no grant from the corporation or municipality in which they are situated, and the land on which they are erected, and its dependencies, shall be exempt from municipal and school taxes, whatever may be the Act or charter under which such taxes are imposed, notwithstanding all provisions to the contrary."

The seminary of St. Sulpice admittedly does not receive any grant from the corporation of the city of Montreal, and is therefore within the benefit of the exemption created by sect. 6, and the only issue raised between the parties is, Whether a district rate for drainage improvements, levied from that portion of the municipal area which directly benefits by its expenditure, is or is not a municipal tax within the meaning of the clause?

The petition does not set forth the source from which the petitioners derive their authority to execute such improvements as drainage, and to assess for their cost. Powers of that description are entrusted to municipal bodies, presumably in the interest of the public, and not for the interest of private owners, although the latter may be benefited by their exercise. Primâ facie, their Lordships see no reason to suppose that rates levied for improvements of that kind are not municipal taxes, and at the hearing of the petition their impression was confirmed by a reference to the general municipal Acts for Lower Canada. The counsel who appeared for the petitioners stated, however, that their powers are

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derived, not from the general Acts, but from a charter, the terms of which were neither referred to nor explained. If the terms of the charter materially differ from those of the general Acts, that deprives the case of any general importance. But it is quite possible that the concluding words of sect. 6 may have been purposely introduced by the legislature in order to secure uniformity of exemption, whatever might be the terms in which the power to assess was conferred; and that, consequently, in construing the clause, the expression "municipal taxes" ought to be interpreted according to its general acceptation, and not according to the meaning which it might be held to bear in some charter or statutes applicable to particular municipalities.

In these circumstances their Lordships are not prepared to advise Her Majesty that the petitioners ought to have leave to appeal. If such questions are, as they say, of frequent occurrence in the city of Montreal they may have the opportunity of obtaining the decision of this Board in another case, upon appeal from the Court of Queen's Bench for the Province. The petition must therefore be dismissed.

Solicitors for the petitioner: *Wilde, Berger, & Moore.*

[HOUSE OF LORDS.]

THE REV. OSWALD JOSEPH REICHEL, CLERK (PAUPER) . . . . . } APPELLANT;

AND

THE REV. JOHN RICHARD MAGRATH, PROVOST OF QUEEN'S COLLEGE, OXFORD UNIVERSITY . . . . . } RESPONDENT.

H. L. (E.)
1889
June 4.

Practice—Pleading—Abuse of Procedure—Frivolous and Vexatious Statement of Defence—Jurisdiction to strike out Statement of Defence.

There is an inherent jurisdiction in the High Court to strike out a statement of defence which is frivolous and vexatious and an abuse of the procedure.

The appellant brought an action against his Bishop and the patrons of a benefice claiming a declaration that he was vicar of the benefice, and that an instrument of resignation which he had executed was void, and an injunction to restrain the Bishop from instituting and the patrons from presenting any other person to the benefice. The action was tried and judgment was given against the appellant on the ground that the vicarage was void by reason of his resignation thereof with the consent of the Bishop. Afterwards the respondent, having been duly appointed to the benefice as the appellant's successor, brought an action against the appellant claiming a declaration that the respondent was vicar and a perpetual injunction to restrain the appellant from depriving the respondent of the use and occupation of the house and lands. In his statement of defence the appellant set up the same case as that on which he had been defeated in the action in which he was plaintiff:—

Held, affirming the decision of the Court of Appeal, that there was an inherent jurisdiction in the Court to strike out the statement of defence as frivolous and vexatious and an abuse of the procedure, and to enter judgment for the plaintiff with a declaration and injunction as claimed.

APPEAL from a decision of the Court of Appeal.

In an action in the Chancery Division brought in 1886 by the present appellant, Reichel, against the Bishop of Oxford and the Provost and Scholars of the Queen's College in the University of Oxford, the plaintiff claimed a declaration that he was vicar of Sparsholt cum Kingston Lisle, and that an instrument of resignation of the 2nd of June 1886 was null and void; an injunction to restrain the defendant bishop from treating the

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instrument as valid and from instituting any other person into the benefice; and an injunction to restrain the defendant college (the patrons of the benefice) from presenting any person for institution into the benefice. North J. on the 12th of January 1887 dismissed the action. That decision was affirmed on the 12th of March 1887 by an order of the Court of Appeal which declared that the benefice became void on the 1st of October 1886 by reason of the resignation thereof by the plaintiff on the 2nd of June 1886 with the approval and consent of the Bishop of Oxford and the acceptance thereof as from the 1st of October 1886, and that the attempted revocation by the plaintiff of such resignation after the receipt thereof by the bishop was invalid and void (1). This order was affirmed by the House of Lords (2).

In July 1887 the present respondent, Magrath, brought an action in the Queen's Bench Division against Reichel. The statement of claim alleged that the benefice became vacant on the 1st of October 1886 by reason of the resignation of the defendant with the approval and consent of the Bishop of Oxford; that the plaintiff was on the 3rd of February 1887 appointed by the patrons to succeed the defendant, and after having been duly instituted was on the 14th of May inducted into possession; that the defendant refused to give up possession of the parsonage-house and glebe lands; and claimed 1st a perpetual injunction to restrain the defendant from continuing in possession and depriving the plaintiff of the use and occupation of the house and lands; 2nd, a declaration that the plaintiff was from the 14th of May 1887 and still was entitled to the possession of the benefice with all the rights, profits and appurtenances belonging thereto; 3rd, £100 damages for trespass.

The statement of defence traversed the allegations in the statement of claim and set up as a defence the same case as that on which the defendant had been defeated in his action against the Bishop of Oxford and the Provost and Scholars of Queen's College.

Upon a summons taken out by the plaintiff and supported by affidavits, the Queen's Bench Division (Wills and Grantham JJ.) being of opinion that the plaintiff might successfully reply res

(1) 35 Ch. D. 48. (2) Ante, p. 259.

judicata and that Order xxv., r. 4, was applicable, on the 6th of December 1887 made an order (varying an order made at chambers) that the statement of defence be struck out and that judgment be entered for the plaintiff for damages to be assessed, with costs, and with a perpetual injunction and a declaration in the terms claimed. This order was affirmed on the 8th of February 1888 by the Court of Appeal (Lord Esher M.R. and Lopes L.J., Fry L.J. dissenting), not for the reasons given by the Queen's Bench Division from which all their Lordships differed, but upon the ground that to set up the defence and attempt to prove it was an abuse of the process of the Court, and that there was an inherent jurisdiction in the Court to strike out the statement of defence as in point of fact frivolous and vexatious. Lopes L.J. quoted with approval the first paragraph of the judgment of Bowen L.J. in *Willis* v. *Earl Beauchamp* (1). Against this decision the defendant brought the present appeal, which was heard immediately after the appeal in *Reichel* v. *Bishop of Oxford* (2).

March 14. The appellant in person:—

The decisions below were erroneous. The Court of Appeal admitted that they could not strike out the statement of defence on the ground that the defendant was estopped from raising the defence, and that the case did not come within Order xxv. rule 4, of the Rules of the Supreme Court, inasmuch as the statement of defence did disclose on the face of it a reasonable answer. The Court however held that there was an inherent jurisdiction to strike out, and to give judgment for the plaintiff. But they admitted that no case had gone that length and that there was no authority for such a decision. It is submitted that the defendant ought to be allowed to raise this defence and to bring forward evidence (which was not given in the former action) that the execution by him of the instrument of resignation was induced by misrepresentation and fraud or at least under a misunderstanding. Fraud avoids everything: *Duchess of Kingston's Case* (3).

(1) 11 P. D. at p. 63. (2) Ante, p. 259.
(3) 2 Sm. L. C., 9th ed., 812, 823.

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[He also contended that the same matter was not in issue in the two suits and referred to *Lockyer* v. *Ferryman* (1); *Bainbrigge* v. *Baddeley* (2); and *Hunter* v. *Stewart* (3).]

H. A. Giffard Q.C. and *F. Mackarness* for the respondent were not heard.

The House took time for consideration.

June 4. The following judgments were delivered after the respective judgments in *Reichel* v. *Bishop of Oxford* (4):—

LORD HALSBURY L.C.:—

My Lords, I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again. It cannot be denied that the only ground upon which Mr. Reichel can resist the claim by Mr. Magrath to occupy the vicarage is that he (Mr. Reichel) is still vicar of Sparsholt. If by the hypothesis he is not vicar of Sparsholt and his appeal absolutely fails, it surely must be in the jurisdiction of the Court of Justice to prevent the defeated litigant raising the very same question which the Court has decided in a separate action.

I believe there must be an inherent jurisdiction in every Court of Justice to prevent such an abuse of its procedure and I therefore think that this appeal must likewise be dismissed.

LORD WATSON:—

My Lords, this is an attempt by the appellant to retain the temporalities of the benefice of Sparsholt by re-trying, with his successor in the benefice, the same issues which have already been conclusively decided against him in a question with his proper contradictor. The Court must, in my opinion, have jurisdiction to forbid any such abuse of its process.

LORD FITZGERALD concurred.

(1) 2 App. Cas. 519.
(2) 2 Phill. 705.
(3) 4 D. F. & J. 168; 31 L. J. (Ch.) 346.
(4) Ante, p. 259.

LORD HERSCHELL :—

My Lords, I am of opinion that this appeal also should be dismissed. The action was brought by the respondent, who had been appointed to succeed the appellant in the benefice, to prevent his remaining in possession of the parsonage-house and glebe lands. The majority of the Court of Appeal were of opinion that the defence set up by the appellant had been properly struck out, on the ground that it was frivolous and vexatious. Your Lordships have heard the appellant in person, who has put before you what he proposes to prove as a defence to the action. After fully considering all that he has said, it appears to me that he has not a shadow of defence, and I am unable, therefore, to differ from the conclusion to which the Court below came.

LORD MACNAGHTEN :—

My Lords, I concur.

Order appealed from affirmed and appeal dismissed.

Lords' Journals 4th June 1889.

Appellant in person.
Solicitors for respondent: *E. W. & R. Oliver.*

[HOUSE OF LORDS.]

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July 1.

THE OWNERS OF THE STEAMSHIP "LEBANON" . . . . . APPELLANTS;

AND

THE OWNERS OF THE STEAMSHIP "CETO" . . . . . RESPONDENTS.

THE "CETO."

Ship—Collision—Fog—Regulations of 1884 *for Preventing Collisions at Sea, Art.* 18.

By art. 18 of the Regulations of 1884 for Preventing Collisions at Sea "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary."

When two steamships, invisible to each other by reason of a thick fog, find themselves gradually drawing nearer until they are within a few ships' length, they are within the second direction of art. 18, and each of them ought at once to stop and reverse; unless the fog-signals of the other vessel have unequivocally indicated that she is steered so as to pass clear without involving risk of collision; or unless other circumstances exist which make it dangerous to stop and reverse.

The decision of the Court of Appeal reversed upon the facts by Lord Halsbury L.C. and Lords Watson, Bramwell, Herschell and Macnaghten, the Earl of Selborne and Lord FitzGerald dissenting.

APPEAL from a decision of the Court of Appeal.

The action was brought in the Admiralty Division by the owners of the steamship *Lebanon* against the owners of the steamship *Ceto* for damage sustained by the plaintiffs by reason of a collision in a dense fog between the two ships. The defendants counter-claimed for damages against the plaintiffs. At the trial before Sir James Hannen assisted by Trinity Masters, the learned President found that the *Lebanon* was alone to blame and gave judgment accordingly.

This decision was affirmed by the Court of Appeal (Lord Esher M.R. and Bowen and Fry L.JJ.) who were assisted by nautical assessors.

Against those decisions the plaintiffs brought the present appeal, it being admitted that the *Lebanon* was to blame, and

the only questions being whether the *Ceto* was also to blame in not stopping and reversing under art. 18 of the Regulations of 1884 (1), and whether the decisions of the Courts below on that point ought to be reversed.

In this House there was a difference of opinion as to the facts, the majority of noble and learned Lords being of opinion that the view of the facts taken by the Courts below was erroneous. The circumstances under which the collision occurred will appear from the judgments, and particularly from that of the Earl of Selborne on the one side and that of Lord Watson on the other.

The appeal was first argued before Lord Halsbury L.C., the Earl of Selborne and Lords Watson, FitzGerald, and Macnaghten.

1888. May 14, 15. Sir *R. Webster* A.G. and *C. Hall* Q.C. (*J. P. Aspinall* with them) for the appellants:—

It is admitted that the *Lebanon* ought to have stopped and reversed under art. 18, and the only question is whether the *Ceto* ought not to have also stopped and reversed. The facts were such as to make that course necessary, there being a risk of collision. The two ships were approaching in a dense fog, and the fog-signals did not indicate that they would pass clear. There being no special circumstances (until the ships came in sight) rendering a departure from the rule necessary in order to avoid immediate danger, art. 23 does not come in question, and the rule laid down in art. 18 was imperative. The ship infringing the regulation is to be deemed in fault; 36 & 37 Vict. c. 85 s. 17; it is not a matter for discretion. This principle was distinctly laid down in *The Khedive* (2). Illustrations of the principle are to be found in *The Kirby Hall* (3); *The John McIntyre* (4); *The Dordogne* (5); and *The Ebor* (6), which were all cases of collision in a fog.

T. T. Bucknill Q.C. and *A. E. Nelson* for the respondents:—

The question at issue is entirely one of fact, the law not being

(1) The Regulations of 1884 for Preventing Collisions at Sea are printed in 9 P. D. at p. 247. Art. 18 is at p. 255.

(2) 5 App. Cas. 876, 887, 904.

(3) 8 P. D. 71.

(4) 9 P. D. 135.

(5) 10 P. D. 6.

(6) 11 P. D. 25.

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in dispute, and on a question of fact which has been decided one way by the judge of first instance who saw the witnesses and by the Court of Appeal, both Courts being assisted by nautical advisers, this House will be slow to reverse the decision, especially as this House has not the advantage of nautical assistance: see *The Alice* (1). The question is whether the circumstances were such that a competent seaman exercising reasonable care would know that there was risk of collision: per Lord Herschell in *The Theodore Rand* (2), quoting with approval expressions of Lord Esher M.R. in *The Beryl* (3). The true view of the facts is that those on board the *Ceto* did not know there was risk of collision until it was too late to stop and reverse, when (as is admitted on the other side) the *Ceto* did right to go full speed ahead. The facts must be looked at as they appeared to those on board the *Ceto* at the time. The case is quite different from that of *The Khedive* (4), where, as the Court of Admiralty found, the master admittedly erred in not stopping and reversing and this House restored the decision of that Court.

C. Hall Q.C. replied.

The House took time for consideration.

The appeal was re-argued on the 1st and 2nd of April 1889 before the same noble and learned Lords and Lords Bramwell and Herschell, by Sir *R. Webster* A.G. (*J. P. Aspinall* with him) for the appellants, and by *Finlay* Q.C. (*Bucknill* Q.C. and *Nelson* with him) for the respondents.

The House took time for consideration.

July 1. LORD HALSBURY L.C.:—

My Lords, if this were a question of nautical skill or of the credit due to particular witnesses, I should be very reluctant to interfere with a judgment arrived at upon the advice of skilled persons, or to differ from a Court which had the advantage of hearing and seeing the witnesses whose credit was in question.

(1) Law Rep. 2 P. C. 245.
(2) 12 App. Cas. 247, 250, 251.
(3) 9 P. D. 137, 138, 139.
(4) 5 App. Cas. 876.

My Lords, I am unable to acquiesce in the view that the matter which your Lordships are called upon to decide is either a question of nautical skill or of the credit to be attributed to the witnesses. So far as the accuracy of the witnesses is involved, I principally rely upon the evidence of those called in support of the case against which I feel called upon to decide.

As to the question of nautical skill, I must deal with it more at large presently.

Now the question shortly stated is whether two vessels approaching each other and knowing that they were approaching each other, in a dense fog, through which it was impossible to see lights or signals or any part of the vessels by either of them, were not both to blame for not stopping and reversing until they had ascertained more distinctly their respective courses. I quite agree that the solution of that question must not depend upon the state of facts afterwards ascertained, unless there was enough to tell both parties at the time what the condition of facts was.

The rule which is supposed to govern the decision of this case, though I am not quite certain that the existence or non-existence of that rule would necessarily be decisive, is that "a steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse if necessary." As I have said each of these vessels knew that they were approaching another ship. Each of them was aware, or ought to have been aware, that their approach did involve risk of collision, and the question is whether the facts were such in the knowledge of each that as prudent and reasonable persons those responsible for the navigation of the ship should have stopped and reversed.

As to the facts giving rise to the question there is in my judgment very little conflict. The preliminary acts of the parties seem to me to shew that there is very little room for contradiction between the witnesses, and the difference, so far as there is a difference, is limited to questions of time and hearing. I do not mean to say that the facts that there was a fog and that the vessels were approaching so as to involve risk of collision are necessarily conclusive. But the fog was of such a character that it is admitted that apart from the sound no conclusion could be

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arrived at as to the course of either vessel by the other, and so far as those facts raise a question of skill it seems to me that no more nautical skill is involved, nothing upon which nautical men would be better able to judge, than if two carts were approaching each other on an ordinary highway and the sole method of judgment were the sounds of the cart wheels. This is indeed understating the case, since on the open sea there is no road, the general direction of which might be a guide. Not the slightest indication of what course either vessel was on could be derived from the sounds which were ultimately proved to have been made by the fog signals. That the *Lebanon* did wrong is certain, and that the *Ceto* in the first instance did right is also certain. But it seems to me that the master of the *Ceto* admits facts which to a seaman must have shewn that the *Lebanon* had starboarded her helm.

I confess I cannot doubt that a reasonably prudent master in order to avoid risk of collision should have stopped and reversed when to his mind at the time it must have been clear that notwithstanding his persistent porting of the helm of his own vessel the approaching vessel remained steadily four points on his bow, which condition of facts was only reconcilable with what he admits he observed, and what we now know to be the fact, that the *Lebanon* was improperly starboarding her own helm.

It is admitted on all sides that when the vessels came within sight of each other it was too late to do anything but what was in fact done to avoid or diminish the effect of the collision.

I do not understand the judgment of the Master of the Rolls to be based upon a comparison of the witnesses of either side as to their credit or accuracy, but almost, if not altogether, entirely upon the inferences which he draws from the fracture of the *Lebanon* upon the starboard side of her stem, and the appearance of that fracture as indicated by the photographs.

My Lords, I do not think that inferences of that character can properly be described as questions of nautical skill at all. They are rather questions which should be addressed to mechanical engineers; but in order to place much reliance on them I should think myself that they ought to have been submitted to some person who had with accuracy and minuteness examined

the fracture, and had been capable of stating to the proper tribunal both the inferences he derived from the appearances which he observed, and the reason for such inferences; subject of course to the ordinary test of cross-examination, in which event probably the rival theories presented in argument to your Lordships at the bar might have been minutely discussed, and each hypothesis, namely, the blow from the starboard side, or the dragging of the stem itself after the vessels were in actual contact, might have been considered. But in truth no such question ever was discussed at the trial. So far as I can see the Master of the Rolls was the first to point out the nature of the blow as indicated by the photograph, which he regarded as sufficient to decide the case without reference to the witnesses called on the one side or on the other.

My Lords, under these circumstances it appears to me to reduce itself to this: Two vessels approaching each other in a dense fog, without the means of ascertaining the course which either ship is pursuing, continue to approach each other, and when one of them which has pursued a correct course finds that the other is pursuing a wrong one, which must almost inevitably lead to a collision, she still continues a course which was originally right, but which on these facts it appears to me threw upon her the duty of stopping and reversing. And inasmuch as she did not pursue that course I think she was to blame.

In the result I move your Lordships that the judgment of the Court below so far as it acquitted the *Ceto* from blame be reversed and both ships be declared to be in fault.

EARL OF SELBORNE:—

My Lords, at the end of the first argument in this case, the impression left on my mind was, that sufficient ground had not been shewn for a reversal of the concurrent judgments of both the Courts below, which held the *Lebanon* solely to blame for the collision which took place on the 20th of August 1886, by which the *Ceto* was wholly lost (with her cargo), and the *Lebanon* slightly injured. The effect of the second argument has been to confirm me in that impression; and I think it due to the learned judges below that I should state the reasons for my opinion,

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though I cannot feel that confidence in them which I should feel if they were shared by the majority of your Lordships.

The question is whether, under the circumstances appearing by the evidence, the 18th sailing rule of 1884 made it the duty of the *Ceto* to stop and reverse? It appears to me that, under the terms of that rule, the burden of proof was upon the *Lebanon*. The Judicial Committee so held in the case of *The Rhondda* (1). The judgment of the Court of Appeal in the case of *The Beryl* (2) laid it down (I think correctly) that "the application of the rule by the officer in charge of a ship depends on whether the circumstances were such that he should, as a prudent and reasonable officer, have come to the conclusion that, in order to avoid risk of collision, he should stop and reverse" (3). That is matter, not for presumption, but for proof.

The rule is: "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse *if necessary*." There is no obligation to stop and reverse unless it is "necessary" to do so in order to avoid the risk of collision: and this is a question of fact, which must in every case depend upon the whole circumstances, and is not solved by the 17th section of the Merchant Shipping Act of 1873 (36 & 37 Vict. c. 85). The *Ceto* in the present case was going as slow as she possibly could; she complied, therefore, with the rule, unless the circumstances were such as to make it "necessary" for her to stop and reverse.

If it has not been settled by any binding authority that a fog (such as existed in this case) always creates such a necessity when ships on opposite courses are approaching each other, as these ships did, I should not infer it from the terms of the sailing rules, or from the reason of the thing. The 18th sailing rule does not refer to fog more than to any other state of weather, and in those rules which expressly apply to the case of fog, there is nothing about stopping and reversing. The 13th rule, which is that most nearly in point, only says, that "every ship, whether a sailing ship or steamship, shall in a fog, mist, or falling snow, go at a moderate speed." And to stop and reverse blindly in a fog

(1) 8 App. Cas. 552. (2) 9 P. D. 137.
(3) See per Brett, M.R., in *The John McIntyre*, 9 P. D. at p. 136.

(unless the other ship did the same thing at the same time) might, as it seems to me, be quite as likely sometimes to cause as to avoid risk of collision.

To establish contributory negligence against a ship whose course would have been right if the other ship had not done what was wrong, it ought, in my opinion, to be made out that she had sufficient knowledge of the wrong course which the other ship was taking within sufficient time to enable her officer or officers in charge to perceive that they ought to alter or stop their own course in order to avoid the risk of collision, and that, by doing so, that risk would certainly be diminished and might perhaps be avoided.

The *Lebanon* was approaching the *Ceto* on her port bow, nearly "end on;" and, as she did so, sounded her whistle from time to time. The *Ceto* ported her helm, and kept porting it more, from time to time, as she heard the *Lebanon's* whistle. If the *Lebanon* had not improperly starboarded her helm, this would have kept her clear, and made a collision impossible. So far the *Ceto* was right, and the *Lebanon* wrong. When the helm-signal from the *Lebanon*, indicating that she was starboarding, was heard by the *Ceto* the evidence appears to me very clearly to shew that the ships were already so close to each other as to make it impossible for the *Ceto* to avoid or diminish the risk of collision in any other way than by remaining under her port-helm, and going "full speed ahead," as she did, and as the people on board the *Lebanon* had called out to her to do. It is not alleged that she could *then* have done anything better. The only question is, whether, before that time, she ought to have stopped and reversed? The appellants' contention is, that there were earlier indications of the approach of the *Lebanon* under a starboard helm, which a prudent and reasonable officer ought to have understood; and that these made it "necessary" for the *Ceto* to stop and reverse, within the meaning of the 18th rule.

So far as the testimony of the witnesses for the *Lebanon* went, they endeavoured to make out a quite different case against the *Ceto*, in which they failed; namely, that she misled the *Lebanon* by signalling that she was starboarding when she was porting. I do not say that this ought necessarily to prejudice the argument

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on this appeal from the statements of the *Ceto's* witnesses; but, at least, it does not help the appellants' present case. The statements elicited in cross-examination from Captain Gibson the master of the *Ceto* (on which the appellants' reliance was mainly placed), were to the effect that, having ported his helm when the whistle of the *Lebanon* was first heard on the *Ceto's* port bow (the effect of which would naturally be to "bring the whistle of the *Lebanon* still broader on the port side"), the next whistle seemed to be at the same distance as the first, viz., four points on their bow; and that instead of the distance of the sounds afterwards diminishing, they came nearer, and kept coming nearer, in spite of the *Ceto's* porting. This evidence was compared with that which in the case of *The John M'Intyre* (1), under circumstances in many respects similar, was held by Butt J., and the Master of the Rolls and Bowen and Fry L.JJ. in the Court of Appeal, to establish the necessity of stopping and reversing, under the 18th rule; and other fog cases were also cited (*The Dordogne* (2) and *The Ebor* (3)), in the first of which Butt J., and in the second Sir James Hannen, and in both the Court of Appeal, arrived at a like conclusion. (Of *The Khedive* (4) and *The Lutetia* (5), both cases of clear weather, I do not think it necessary to speak.) There is danger, I think, in taking one particular part of a witness's evidence without its qualifications, and treating such authorities as these as laying down an inflexible rule for every case in which similar evidence (however qualified) is found. I am the more impressed with that danger, because those three judges in the Court of Appeal who decided the present case in the *Ceto's* favour were the same who held in the case of *The John M'Intyre* (1) that there was contributory negligence; and Sir James Hannen, who in the case of *The Ebor* (3) came to a like conclusion, was the judge of first instance who in the present case decided for the *Ceto*. In both courts these learned judges were assisted by competent nautical assessors.

I have spoken of the danger of separating from its context one

(1) 9 P. D. 135.
(2) 10 P. D. 9.
(3) 11 P. D. 25.
(4) 5 App. Cas 876.
(5) Reported as *Maclaren* v. *Compagnie Française de Navigation à Vapeur*, 9 App. Cas. 640.

particular portion of the evidence given on cross-examination by the witnesses for the *Ceto*. The context to which I refer, in the evidence of the witness Gibson, is to the effect that, as the sound of the *Lebanon's* whistle came nearer, he said "Port, and give him plenty of room; he is well on our port side;" that he did not stop and reverse "because he thought by the sound of his whistle" that the *Lebanon* was "well clear of him." The sound "appeared to get broader, it might be a point, as it went amidships." He "could not tell that the vessel must be coming towards him if it did not get broader than that." "He could not tell that he" (i.e., the master of the *Lebanon*) "must be starboarding." He "never thought about such a thing as the man starboarding when he was on a ship's port side."

That it would not have been right to stop and reverse at the last moment was, as I understood the argument, conceded. To stop and reverse earlier (when there was no indication that the *Lebanon* was also stopping or reversing) might (as far as I can judge) have been reasonably thought dangerous, rather than conducive to safety. If it might reasonably be thought safer to attempt to get out of the way, than to lie in the way of the approaching vessel like a log upon the water, the 18th rule would not, in my judgment, be broken; and it appears to me, as it did to the Master of the Rolls (though I am better satisfied to look, for that purpose, to the fracture of the *Lebanon* just on the starboard side of her stem than to the mere displacement of her stem itself), that the impact took place in such a way as would not have been possible without some extraordinary deviation by the *Lebanon* from her proper course very soon before.

Of the whole effect of this evidence, the nautical assessors who assisted Sir James Hannen, and who saw and heard the witnesses, were much more capable judges than I can pretend to be. They cannot have thought it, taken altogether, sufficient to shew that the circumstances made it necessary for the *Ceto* to stop and reverse, under the 18th rule. The question was one of degree and of time. The *Lebanon* was moving much faster than the *Ceto*. The ships did not see each other until it was too late to stop and reverse. The *Ceto*, by porting and continuing to port, took in the meantime a proper course, and one which a "prudent

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and reasonable officer" might well believe to be the best course for safety. If the distance between the ships, as indicated by the sounds of the *Lebanon's* whistle, appeared nevertheless to diminish rather than increase (except by about a point as it "went amidships"), I am not convinced that this was enough to prove the *Ceto* in the wrong, as long as a prudent and reasonable officer might judge that he was at a safe distance. I think it easy to lay too much stress upon impressions of this sort derived from sound only when the ships were approaching and could not see each other. To some extent the distance might naturally diminish, under conditions of safety, as the courses of the two ships came nearer before they passed each other.

In order to get rid of the weight of the decision of Sir James Hannen and his assessors, it was assumed that the question raised by the present appeal was overlooked, and not urged before that learned judge. But it arose directly out of the evidence, then as much as now; the cross-examination had been directed to that very point; and if it was not then raised by the appellants I cannot but infer that the appellants' own counsel did not at that time take the same view of its importance as that on which the appellants now insist. If that is the explanation, I must confess that it seems to me of bad example that a party should succeed in your Lordships' House upon such a point, when it was not taken before the Court of first instance, and has not been held to be established by the Court of Appeal.

Upon the whole, I am unable upon this question (which I regard as one not of law but of fact, and of nautical skill and judgment) to give my voice for reversing the order appealed from.

LORD WATSON:—

My Lords, on the 20th of August 1886, between 2.30 and 3 A.M., two steamships, the *Lebanon*, of 595, and the *Ceto*, of 612 tons register, came into collision in the open sea, off the Yorkshire coast. A dense fog had prevailed for some time, and the *Lebanon* had reduced her speed to "easy," whilst the *Ceto*, which had already been crippled by another collision in the same fog, was going "dead slow"; and both vessels kept repeating, at intervals, the

signals required by the 12th article of the Regulations. From first to last both ships had abundance of sea room, no signals having been heard by either of them except their own.

At the time when the vessels came within such a distance of each other that their fog-signals could be mutually heard, the course of the *Lebanon*, according to the evidence of the chief mate, who was in charge of her navigation, was south-by-east half east. On hearing the first whistle from the *Ceto*, about two points on his starboard bow, he starboarded two points, and then steadied his helm, on a south-east course. The course of the *Ceto* is stated by her master to have been north-by-west. When he first heard the whistle of the *Lebanon* it appeared to him to come from a distance, which he judged to be not less than a mile, and from a direction which seemed to be four points upon his port-bow. The helm of the *Ceto* was thereupon ported, and she was gradually edged off to starboard, in order to keep her clear of what was conjectured to be the course of the *Lebanon;* but, owing to the slowness of her speed, the only effect of the port helm was to bring her head round about two points to starboard before the *Lebanon* was sighted. Up to that time, notwithstanding the *Ceto's* change of helm, the sound of the *Lebanon's* whistle steadily continued to draw nearer, and it still appeared to bear, as when first heard, four points on the port-bow of the *Ceto*. When the two vessels, though still invisible, were very close, the *Lebanon* starboarded, and also gave the signal that she was starboarding, and in a few seconds they came into sight of each other. As stated in the preliminary acts, the *Ceto*, as observed at that moment from the *Lebanon*, was about two or three points on the starboard-bow, distant about a ship's length: and the *Lebanon*, as seen from the *Ceto*, bore about four points on the port-bow, distant about sixty yards. The master of the *Ceto* says that he then observed the white light of the *Lebanon* just in front of his port-beam, when he at once put his helm hard-a-port; but the order was scarcely given before the engines of the *Ceto* were turned full speed ahead, in obedience to a hail from the *Lebanon*. At the same instant the engines of the *Lebanon* were stopped and reversed, but, having still way on her, she struck the port side of the *Ceto*, thirty feet from the taffrail, cutting her down below the water and sinking

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her. The *Lebanon* sustained no injury from the collision, except that her metal stem was crushed aside in the direction of the port-bow.

At the trial before the Admiralty Court the appellants endeavoured to cast the whole blame of the collision upon the *Ceto*, in respect of her having, as they alleged, misled the *Lebanon*, by a false signal, into the belief that she was starboarding, when, in point of fact, she was porting. They did not press their alternative case that the *Ceto* ought to have stopped and reversed; probably because that line of argument would necessarily have involved the *Lebanon* in fault for not doing the same. The result was that the President negatived the allegation that the *Ceto* signalled she was going to starboard, and found the *Lebanon* alone to blame, on the ground that she ought, like the *Ceto*, to have reduced her speed to dead slow.

In the Court of Appeal the learned judges were also of opinion that the *Lebanon's* rate of speed was not "moderate," within the meaning of rule 13; but the point chiefly discussed before them was the duty of the *Ceto* to stop and reverse, and they all came to the conclusion that no such duty was incumbent upon her. The Master of the Rolls and Bowen L.J. were of opinion, upon the evidence, that the *Lebanon* was well abeam of the *Ceto*, on the port side; that there was no danger of collision until the *Lebanon* starboarded; and that the effect of her manœuvre was to bring her right round in the water, so that she struck the stern quarter of the *Ceto* with the starboard side of her bow. Their opinion appears to be mainly, if not wholly, rested upon the condition of the *Lebanon's* stem, as shewn in a photograph taken after the vessel was docked. Fry L.J. expresses doubt as to their inference from that exhibit, but states his own opinion to be "that the whistling of the *Lebanon* was broad on the port side of the *Ceto*, and that being the state of things, it was not an imprudent course for the *Ceto* to advance in the direction in which she was advancing."

If I could agree with the conclusions of the learned judges as to the facts of the case I should have no hesitation in exonerating the *Ceto*. But the view which they take appears to me to be irreconcilable not only with the evidence, but with the case

made by both parties in their pleadings. According to their preliminary acts when the vessels first saw each other, the *Lebanon* was ahead, and not abeam of the *Ceto*, the *Lebanon's* bearing being about four points upon the *Ceto's* port bow, and the *Ceto's* about two or three points on the *Lebanon's* starboard bow. No witness from the *Ceto* places the *Lebanon* at any time broad upon their vessel's port side. The master, to whose evidence I shall have to refer hereafter, places the *Lebanon* throughout "about" four points upon his port bow. Wynpenny, the look-out of the *Ceto*, says that when she first whistled, the *Lebanon* was two points upon their port bow, and that her bearing had changed to about three points when her masthead light became visible; and he also says that between these two periods of time the *Lebanon's* whistle "gradually drew a little more aft, and seemed to be getting nearer." The difference between the master and his look-out as to the bearing of the *Lebanon* when first heard is, no doubt, due to the circumstance that whilst both agreed she was on their port bow, the number of points was matter of estimate, or rather, of conjecture. In delivering judgment, the Master of the Rolls is reported to have said, "You can never try an Admiralty case so as to get at the truth, unless you look with great scepticism on the evidence on both sides." Unfortunately that observation is too frequently justified by the conflict of testimony which occurs in such cases. But I am not prepared on that account, and without very strong cause, to question the credibility of nautical witnesses when their testimony relates to facts which it was their special duty to observe, and is not only free from contradiction, but in strict accordance with the particulars given by the parties to the suit. I am unable to derive from the photograph so much relied on by the respondents any good reason for disbelieving the witnesses, rejecting the preliminary acts, and accepting the theory which found favour with the majority of the Appeal Court. The condition of the *Lebanon's* stem after the collision is, to say the least, a very uncertain guide to the truth, in the absence of precise information as to the force of her impact upon the *Ceto*, or as to the time during which the two vessels were engaged. The engines of the *Lebanon* were at that time reversed, and the *Ceto* was getting into full speed across her bows

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from starboard to port. Assuming that the stem of the *Lebanon* was started, as it well might be, by the first force of the blow, it might naturally be crushed over to her port side, if the vessels remained for an appreciable time in contact, as they possibly, if not probably, did. In these circumstances I am constrained to believe that, as the witnesses state, the *Lebanon* struck the *Ceto* nearly at right angles, and that before the collision the relative bearings of the two ships continued to be as they allege.

Your Lordships were not asked to disturb the finding of both Courts below, to the effect that the *Lebanon* was to blame; but the appellants maintain that the *Ceto* was also in fault. They admit that after the vessels were within sight the *Ceto* did not transgress the rules by going full-speed ahead instead of stopping and reversing. They could hardly escape from the concession, because the *Ceto* was invited to take that course by the officer of the *Lebanon*; but it does not follow that the *Ceto* was free from blame in getting into a position which necessitated the manœuvre. The appellants argued that it was the duty of both vessels to stop and reverse before they came in sight, and that the *Ceto* having failed in that duty must be deemed to have been in fault.

The point thus argued by the appellants is raised upon the pleadings, as well as upon the evidence, and was fully discussed in the Court of Appeal. That being so, I think we are bound to consider it upon its merits. Rule 18 requires that every steamship, when approaching another ship so as to involve risk of collision, "shall slacken speed or stop and reverse if necessary." There is this distinction between the two alternatives which the rule enjoins, that the first is imperative, whereas the second is only required when there is necessity for it. But as my noble and learned friend opposite (Lord Bramwell) observed in the course of the argument, the necessity to which the rule refers is that of avoiding, not collision, but the risk of collision. In consequence of the shape in which the case was presented to the Admiralty Court, and the view which was taken of the facts in the Court of Appeal, there is no expression of opinion by their respective assessors upon the facts of the case as they appear to some of your Lordships, and to myself, to be established in

evidence. That is a circumstance to be regretted; and great stress was naturally laid upon it in the able arguments of the respondents' counsel. At the same time I do not think that circumstance ought to interfere with our disposal of the case; because I agree with those of your Lordships who think that the question which arises upon the facts as we are prepared to find them depends very much upon the construction of rule 18, and involves considerations as much of common prudence as of nautical skill.

Whether it was, in a reasonable sense, necessary for the master of the *Ceto* to stop and reverse his engines before the *Lebanon* hove in sight is a question not of law but of fact. His duty in that respect must depend, not upon the result of the whole facts now disclosed in evidence, but upon his own observations of the *Lebanon's* fog signals, and the indications of the position and course of the *Lebanon* relatively to his own vessel, which these observations ought to have conveyed to a prudent seaman of ordinary skill. I shall, therefore, limit my consideration of the evidence to such parts of it as relate to what was heard and done by the officer who was navigating the *Ceto*.

When the master first heard the signals of the *Lebanon*, he seems to have come to the conclusion that the vessels were approaching each other, and also to have formed the surmise that they might possibly be approaching so as to involve risk of collision. Having only heard a single whistle, he had at that moment no data from which a reliable inference could be drawn as to the course which the *Lebanon* was pursuing; but he assumed that she would pass on the port side of his vessel, and he accordingly ported a little in order to give her room. As the two ships advanced, he heard several signals from the *Lebanon*, each successive whistle sounding nearer than the preceding one. As the sounds drew closer still, assuming that the course of the *Lebanon* would carry her to port of the *Ceto*, he gave a second order to his steersman. According to his own evidence, he said, "Port and give him plenty of room; he is well on our port side." I have already noticed the fact that the effect of her port helm was to bring the head of the *Ceto* two points to starboard before the collision. What appears to me to be the most important

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part of the evidence of the master is his distinct statement, more than once repeated, that both before and after his second order to port was given, or in other words, from the time when the signal of the *Lebanon* was first observed until she was just coming into sight, the sound of her whistle, whenever it was heard, continued to bear steadily about four points on the port bow of the *Ceto*. He does, indeed, attempt to say that at one time (he does not say when) it appeared to broaden a little; and on his being pressed to say how much, his reply was, "It might be a point."

The circumstances in which he was placed, as detailed by the master of the *Ceto*, appear to me to involve considerations of general importance, touching the application of the second alternative of the 18th rule. In broad daylight, or in the night time, so long as ships' lights are discernible at a moderate distance, I do not think that it is within the meaning of the rule "necessary" for two approaching steamers to stop and reverse until it becomes apparent to the eye that if they continue to approach they will in all likelihood either shave close or collide. When the approaching vessels are enveloped in fog, and cannot see each other, the rule must, in my opinion, apply with greater stringency. Their respective officers are, in that case, guided solely by their sense of hearing, which may enable each of them to speculate with more or less accuracy as to the position of the other vessel at the time when its fog whistle is heard. But the direction from which the whistle comes can afford no indication of the course of the approaching vessel unless the sound is repeated, and its bearing is, on each repetition, carefully observed. Even then the bearing of the vessel and its course are more or less matters of speculation, and cannot be ascertained with the same certainty as if her hull or lights were in view. When two steamships, invisible to each other, by reason of a thick fog, find themselves gradually drawing nearer, until they are within a few ships' lengths, they are, in my opinion, within the second direction of rule 18, and each of them ought at once to stop and reverse, unless the fog signals of the other vessel have distinctly and unequivocally indicated that she is steered on a relatively safe course, and will pass clear, without involving risk of collision. In the absence of such indications, it humbly appears to me that to negative the

necessity for stopping and reversing when the vessels are near to each other, though still unseen, would be to thwart the very purpose for which the rule was enacted.

I do not think that the effect which, in my opinion, ought to be given to the second branch of the rule, when approaching ships are enveloped in fog, is at variance with the judicial construction which it has already received. In the case of *The Frankland and The Kestrel* (1), the opinion of the Privy Council with respect to *The Frankland* was thus stated by Lord Monkswell (2): "That she was navigating in a fog at a moderate speed, that she heard a whistle sounded many times, indicating that a steamer was approaching her, and had come very near to her, so near indeed that if the vessels had then stopped they would have been within hailing distance; that at that point of time it was necessary for the captain of *The Frankland*, under the terms of the rule, not only to stop the motion of the engines, but to reverse them, so as to stop the motion of his vessel, and that he ought not to have waited until the vessels sighted each other." Sir Robert Phillimore, in *The Kirby Hall* (3), explained the rule in terms even broader than I should consider necessary for the purposes of this case. The doctrine laid down by the Privy Council in *The Frankland* has been recognised by the Court of Appeal in *The John McIntyre* (4), *The Dordogne* (5), and *The Ebor* (6), all of which were cases of collision in dense fog. In the first of these cases, the present Master of the Rolls said (7): "It may be laid down as a general rule of conduct that it is necessary to stop and reverse, not indeed every time that a steamer hears a whistle or fog-horn in a dense fog, but when in such a fog it is heard on either bow and approaching, and is in the vicinity, because there must then be a risk of collision." To the proposition so stated I entirely assent. When the approaching vessel is nearly ahead, the duty to stop and reverse is obvious; but it appears to me to be equally imperative when the other vessel is drawing near upon either bow. It matters not whether

(1) Law Rep. 4 P. C. 529.
(2) Law Rep. 4 P. C. 534.
(3) 8 P. D. 78.
(4) 9 P. D. 135.
(5) 10 P. D. 6.
(6) 11 P. D. 25.
(7) 9 P. D. 136.

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the bearings of the approaching ship be one point or four; either position is fraught with danger of collision if it continues to advance without change of bearing.

The reason which the master of the *Ceto* assigns for not stopping and reversing when the *Lebanon* came near is this: "Because I thought by the sound of his whistle that he was well clear of me." I regret to say that I am unable to find in his evidence a single circumstance which could justify the conclusion that the *Lebanon* was going clear of him. I need hardly say that, if the *Lebanon's* course had been such as would carry her clear of his ship on the port-side, the sound of her whistle, as the vessels drew nearer, would have gradually broadened until it was abeam of the *Ceto*. The fact, which he did observe, that notwithstanding their mutual advance, and his own change of helm, the *Lebanon* still continued to approach upon his port-bow with unaltered bearing, indicated that the two vessels were sailing on intersecting lines, and that, unless there was a change in the bearing of the *Lebanon*, they would, as a matter of mathematical certainty, meet at the point of intersection. In these circumstances I am of opinion that his continuing to advance when he knew or ought to have known that, in spite of his port-helm, the *Lebanon* was coming nearer, without any appreciable change of bearing, was a violation of the second part of the 18th rule; and I am of opinion that the *Lebanon* was equally within the rule, and was also to blame for not stopping and reversing.

I have for these reasons come to the conclusion that the orders appealed from ought to be reversed, and that it ought to be declared that both vessels were in fault.

LORD BRAMWELL:—

My Lords, I am fully sensible of the strength of Mr. Finlay's remark, viz., that we are called upon by the *Lebanon* to overrule the judgments of two Courts assisted by nautical advisers, and that without having ourselves the benefit of such experts. The latter is a very weighty consideration. One may hope with care and attention to come to a right conclusion on matters of ordinary everyday life; but this is not such a case. We are not (at least I am not) familiar with nautical matters, and may go

wrong from sheer ignorance. I do not feel the want of such advice in the present case, for reasons which I will mention hereafter.

The two vessels were approaching each other, and that there was a *risk* of collision is certain, for there was a collision. But, as Mr. Finlay says, the question is, Did the *Ceto* know that? Now, the captain of the *Ceto* says he knew that the *Lebanon* was getting nearer (Appendix 44). Then was it necessary for him to stop and reverse? That word "necessary" does not mean that the situation was such that without stopping and reversing a collision would take place; it means rather "prudent or expedient." The answer seems to me to be this; that he did not *know* where the other vessel was, nor what she was doing; that he *thought* something, that he speculated, and that he acted on his opinion, instead of making sure by stopping and reversing. There was no reason why he should not; it was a calm, and no other vessel was near. The captain does not give the reason of the second officer for not doing so, viz., that he would have been run into amidships; and that reason is a bad one, for the reversing and going astern should have taken place in time to prevent the collision at any part. I think therefore that the *Ceto* was to blame. I should think so if there were no statutory rule. I cannot see what Mr. Finlay says is the question that was put to the nautical assessors. Therefore I cannot think I am differing from them.

I refrain from going into the nice questions of where the *Ceto* might reasonably judge the *Lebanon* to be; I purposely abstain. The *Ceto* should not have judged, but have made sure. To discuss the probabilities is to do what I think the *Ceto* should not have done. I may, however, say that I think that the *Ceto* might well have judged, without imputing too much stupidity to the *Lebanon* (as was suggested in the argument), that it was nearing her.

These are the grounds of my opinion. They are short, but I am unable to say more.

LORD FITZGERALD:—

My Lords, I concur in the reasoning and in the conclusion of the noble and learned Earl opposite, and as my opinion has not

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been changed by the re-argument I will read the judgment I prepared immediately after the first argument.

The question is resolved into one substantially of fact, and is thus put in the appellants' case. "On the appeal the only question is, whether the *Ceto* was to blame for not slackening speed, and stopping and reversing." The *Ceto* did slacken speed; the order had been given in due time that she should go as slowly as she possibly could; that order was acted on, and she had for some time before the collision been going as slowly as she could. That matter of fact is stated in all the judgments below, and was not controverted here.

The 18th article of the Orders in Council, on which the decision turns, points out that when approaching another ship so as to involve risk of collision a steamship "(1) shall slacken her speed: (2) or stop and reverse if necessary."

The question, then, is narrowed to this. Were the circumstances such as to render it necessary for the *Ceto* to stop and reverse? or, as put in the appellants' case, had it become the *duty* of those in charge of the *Ceto* to do so? "Necessary," as here used, is a word of flexible meaning, to be interpreted according to the surrounding circumstances. Were, then, the circumstances such as to convey to the mind of a skilled mariner that the risk of collision was so imminent as to make it indispensable to stop and reverse?

The action was instituted by the *Lebanon* against the *Ceto* alleging that (1) a good look-out was not kept on board the *Ceto;* (2) the helm of the *Ceto* was improperly ported; (3) the *Ceto* improperly neglected to comply with arts. 12, 13, 18, 19, 22, and 24 of the Regulations for Preventing Collisions at Sea.

In these allegations the plaintiffs failed in the courts below, and fail here, unless your Lordships should be satisfied that there was a breach of duty on the part of the *Ceto* within the concluding sentence of rule 18.

The case came before the President of the Admiralty Division, aided by two naval captains, and on reading the evidence there given it cannot be affirmed that the question on which the appellants now rely was brought under the notice of the Court, and it is quite certain that no decision was asked on it: on the

contrary, the allegations appear to have been that the *Ceto* had improperly ported, had not slackened her speed, and had misled the *Lebanon* by an erroneous signal. The result has been that your Lordships have lost, on the very question now before the House, the aid of that skilled tribunal. That Court does determine, "We are of opinion that the *Lebanon* was *alone* to blame."

The appeal did not question the judgment, save on the word "alone," and alleged that both vessels were to blame. On this head the Master of the Rolls observes: "Then the question arises whether the *Ceto* broke the second rule. That the *Lebanon* was in the wrong for breaking the first rule is clear. If she broke the first rule, and kept breaking it up to the moment of the collision, she not only broke the first rule, but she broke the second also. *Therefore her case is hopeless.* In that case the question is whether the *Ceto*, who obeyed the first rule, broke the second rule."

The Court of Appeal was also assisted by its nautical assessors, by whose opinion on a question expressly put to them they were aided. That question was, whether it was necessary (in a nautical sense) for the *Ceto* to have stopped absolutely dead on the water, and to which the assessors answered "*No.*"

That Court was unanimous, "that the *Ceto* did nothing to break the rule, because there was nothing to shew her that it was necessary to stop and reverse." She was ignorant of the false manœuvre of the *Lebanon* in starboarding. My Lords, the noble Earl referred to the judgment of the Master of the Rolls in the case of *The Beryl* (1). I recall attention to it because it has received the sanction of this House in *Baker* v. *Owners of The Theodore H. Rand* (2). Lord Herschell there quotes this passage: "But when you speak of rules which are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known to the parties at the time; You cannot regulate the conduct of people as to unknown circumstances." Lord Herschell adds: "I entirely concur in the view thus expressed, and adopt the language of the learned judge."

The noble Earl now gives his approval of the judgment in *The Beryl*, so far as it has been quoted.

(1) 9 P. D. 137, at pp. 138, 139. (2) 12 App. Cas. 250.

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My Lords, we have to consider this narrow question of fact, and under circumstances not favourable to the *Lebanon*. There is a finding not now contested that she was to blame, and there can be no doubt that her erroneous manœuvres and breaches of the rules to prevent collision led directly to the calamity, which otherwise would not have happened. But for the error of the *Lebanon* in starboarding both ships would have passed each other in safety. The *Lebanon* undertakes to establish that the *Ceto* was also to blame, and seeks the protection of the Admiralty rule in such cases.

The onus lies on the *Lebanon*, on the maxim "Qui dicit non qui negat." The *Lebanon* undertakes to establish affirmatively from the evidence that the circumstances in proof were such as ought to have conveyed to the mind of the master of the *Ceto*, at a time before the collision became inevitable, that it had become his duty "to stop and reverse."

From the preliminary acts it appears that the parties stated that the time was 2.30 A.M., or about 3.0, weather calm, dense fog. The fog was so dense that when each ship saw the masthead and side light of the other, and "almost simultaneously," they were not more than a ship's length asunder. The fog was so dense that "to see," in the sense of being guided by sight, was impracticable.

The master of the *Ceto* had nothing to guide him but his sense of hearing, and that sense certainly, or probably, rendered less acute, less to be relied on, by the fog.

The evidence on which we have to act comes from Gauntlet on the part of the *Lebanon*, and Gibson for the *Ceto*. The former scarcely touches the question, and seems to be mainly directed to establish a false manœuvre by the "porting" of the *Ceto*, and that the *Lebanon* was misled by her signals. At the close of Gauntlet's direct evidence he says he spoke to the captain of the *Ceto* when he got aboard the *Lebanon* and asked him "why he blew two blasts of his whistle and ported." "When he ported, why he gave the starboard signal for the port helm." That was, then, substantially his case, and that case entirely failed.

Gibson, on the other hand, seems completely to meet and negative that case; he heard the whistle of the *Lebanon* appa-

rently about a mile and a-half off, and the *Ceto* was then fairly "dead slow, just merely turning over to keep the ship steering," and gave the signal to "indicate that I was going on my regular course and keeping to port."

I have to confess that I am ignorant on the subject of navigation, but I gather from this appeal that to stop a ship dead, to take all the way off her so that she would cease to be under command and be as a log on the water, is a manœuvre that might often lead directly to calamity, and could only be excused by the existence of actual necessity. That is really what art. 18 points out. If the *Ceto* had actually stopped and a collision taken place notwithstanding, an event by no means improbable, it would lay her open to the imputation that the calamity arose from her stopping without necessity.

My Lords, it seems to me, on the fullest consideration, that the position was not such as to shew to a skilled seaman that there was then that imminent risk of collision which would create a necessity for stopping and reversing. There was no such risk of collision until the starboarding of the *Lebanon*; that manœuvre could not have been foreseen, and could not have been known to the master of the *Ceto* until the *Lebanon* actually hove in view, and all parties agree that then the *Ceto* took the only step that might by possibility avert the danger, but it was too late. If there was an error on the part of the officer of the *Ceto* it does not appear to have arisen from negligence or want of skill. If an error was committed it was an error of judgment under circumstances of embarrassment and difficulty.

LORD HERSCHELL:—

My Lords, I have been somewhat embarrassed as to the course which your Lordships ought to take in this case. The sole question is, whether the *Ceto* should be held to blame in respect of having disobeyed the requirements of art. 18, which provides that every steamship when approaching another ship so as to involve risk of collision shall, if necessary, stop and reverse. This resolves itself into the further question whether under the circumstances, in a dense fog and with the indications which the master of the *Ceto* had of the position of the other vessel, he

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ought by the exercise of reasonable care and prudence to have known that it was necessary to stop. For I agree that the necessity must not be such as to become manifest only when all the facts are ascertained, but must be such as would be apparent to a seaman of ordinary skill and prudence with the knowledge which he possesses at the time.

This may properly be said to be a question of navigation, and if in such a case the four nautical assessors by whom the Courts below were assisted had concurred in thinking that in abstaining from taking the course suggested as the proper one, the master had exercised reasonable care and prudence, and the same view had been adopted by the Courts, I think your Lordships ought to have held the matter concluded, unless you saw that there had been some erroneous interpretation of the law. Your Lordships have no nautical assistance. I have in a previous case expressed my opinion that this is to be regretted so long as the law permits such questions to be submitted for your Lordships' consideration. But being without this assistance, I think that in such circumstances as I have indicated it would be better and safer that your Lordships should hold yourselves bound by the concurrent findings thus arrived at upon a question of navigation, than that you should act upon the impression produced on your own minds by the evidence.

In the present case, however, you have not these concurrent findings. The question whether the *Ceto* ought to have stopped is not touched upon in the judgment of the President of the Admiralty Division, who says: "Having come to the conclusion that she was going at as slow a pace as she possibly could, there was at the time when she came in sight nothing else for her to do than what she did on the spur of the moment at the instigation of those on board the *Lebanon*, viz., to go full speed ahead. I am advised that that was the best thing that she could do under the circumstances, and, therefore, that she is not to blame." It is evident that neither the President nor his assessors dealt with the question whether the *Ceto* ought to have stopped. It has been explained to your Lordships that this arose from the point not having been distinctly taken before that tribunal. In the Court of Appeal, however, it was definitely put forward by

the present appellants, and the opinion of that Court was pronounced upon it.

It has been said that there was nothing to prevent this course being pursued, that any question arising upon the pleadings and evidence was open in the Court of Appeal, even though not taken in the court below. This is no doubt true as a general rule. I do not think it necessarily applies where, if the point had been distinctly taken, it might have suggested, either to counsel or to the Court, questions to the witnesses which were not put. The matter, however, was entertained by the Court of Appeal without objection apparently on the part of the respondents. That Court, assisted by its nautical advisers, adopted a view adverse to the appellants.

Under all the circumstances I should have felt well satisfied if your Lordships could have seen your way to leave the judgment pronounced undisturbed. As, however, I understand that a majority of your Lordships have come to the conclusion that the judgment ought to be reversed, I feel bound to state the reasons why I am by no means prepared to dissent from the view taken of the evidence by those of your Lordships who have arrived at that conclusion.

I think that when a steamship is approaching another vessel in a dense fog, she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another. I, of course, except a case where there is some other circumstance existing which renders it more prudent not to stop. In the present case no such circumstance was suggested. The weather was calm, and there was nothing to indicate the presence of more than one vessel in the neighbourhood. We have therefore only to consider whether the circumstances might properly convey to the mind of the master of the *Ceto* that the course of the other vessel was such that they would pass clear of each other. This is the test put by the Master of the Rolls in the court below. He thought the *Ceto* was bound to stop unless the sound of the whistle shewed that the *Lebanon* was broadening on her port bow. He intimated the opinion that a point or two would not suffice, but that to absolve her from the obligation, the other vessel must have got broad off as she approached.

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Now, what is the evidence? The master states that he first heard the whistle about four points on his port bow. He ported a little to give her more room. When he next heard the whistle it was still four points on the port bow. He continued porting, and altered his course under a port-helm about two points. The utmost change in the bearing of the whistle of the other vessel to which he speaks is, that he thought it might get a point broader. None of the other witnesses put the case more favourably for the *Ceto*.

I quite agree with the Master of the Rolls that rigorous accuracy is not to be expected in the evidence of seamen in cases of this description. It would be a mistake to tie them down too rigidly to the letter of their evidence, to the exact number of points that are mentioned, either in relation to the bearing of the other vessel or to the alteration of their course. I think we must treat the matter somewhat broadly. But allowing all this, I fail to see what justification the master had for supposing that the vessels were approaching on such courses that they would pass clear. When the second whistle was heard there was no broadening, and, notwithstanding the fact that the *Ceto* had been porting, the broadening never became substantial. In taking this view of the evidence, I do not think I differ from the Master of the Rolls. But he thought that the direction and force of the blow conclusively shewed that the *Lebanon* only starboarded at a very late period, that she must have got very broad off the port side of the *Ceto*, and that the whistles must have been heard by the master broader and broader on his port bow, so as to intimate to him that she was getting broader and broader. I think it is a serious matter thus to set aside the evidence of the witnesses, and to assume in favour of the ship that the facts were not as they represent them, and to find the master justified on the ground that something was observed by him very different from that which he tells us he did observe. Nevertheless, if such a fact were conclusively proved, I agree that it might be sufficient to determine the case.

I frankly admit that I have approached this point with every desire to take the same view of it as the Master of the Rolls, and to support the judgment of the Court below. But I have found myself unable to see that the circumstances relating to the blo w

its position, force, and direction, do afford the conclusive proof which has been attributed to them, and justify the view which has been taken of the whole of the evidence.

LORD MACNAGHTEN:—

My Lords, I agree in the result at which the majority of your Lordships have arrived. After the first hearing I had the advantage of considering the opinion of my noble and learned friend opposite (Lord Watson), and concurring in it, as I do entirely, I have not thought it necessary to trouble your Lordships with any further observations in this case.

Judgments appealed from reversed: Declared that both the Lebanon *and the* Ceto *were in fault: Respondents to pay to appellants their costs in the Court of Appeal and in this House: Cause remitted to the Probate, Divorce, and Admiralty Division.*

Lords' Journals 1*st July* 1889.

Solicitors for appellants: *Botterell & Roche.*
Solicitors for respondents: *Lowless & Co.*

[HOUSE OF LORDS.]

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COOKE, SONS & CO. . . . . APPELLANTS;

AND

THE GOVERNOR AND COMPANY OF THE NEW RIVER . . . . . RESPONDENTS.

New River Company—"Consumer of Water"—Supply by Meter—New River Company's Act 1852 (15 & 16 *Vict. c. clx. s.* 41).

The words "any consumer of water" in sect. 41 of the New River Company's Act, 1852 (15 & 16 Vict. c. clx.) mean, not any person merely desirous of being a consumer but, a person who is actually consuming water or who at least is entitled to demand a supply for his consumption and is taking the necessary steps to obtain it.

The decision of the Court of Appeal (38 Ch. D. 56) affirmed.

THIS appeal from a decision of the Court of Appeal involved no principle of law, and turned, not on the construction of any general statute, but on the meaning of the special clauses of a special Act, the New River Company's Act 1852 (15 & 16 Vict. c. clx). The case is reported before Kekewich J. (1) and in the Court of Appeal (2). For the facts, the sections of the Act, and the arguments, it is sufficient to refer to the report of the decision in the Court of Appeal.

July 18, 19. Sir *Horace Davey* Q.C. and *Rigby* Q.C. (*R. C. Dobbs* with them) for the appellants.

Sir *R. Webster* A.G. and *Warmington* Q.C. (*F. Vaughan Hawkins* with them) for the respondents.

Sir *H. Davey* Q.C. in reply.

The House took time for consideration.

Aug. 9. LORD HERSCHELL:—

My Lords, the question in this case turns on the construction of sect. 41 of the New River Company's Act of 1852.

(1) 36 Ch. D. 641. (2) 38 Ch. D. 56.

The appellants are the occupiers of a warehouse situate in Friday Street, in the city of London, which is within the limits of the New River Company as defined by their Act. For some years prior to June 1886 the appellants had been supplied by the respondents in the ordinary way with water, which was used for cleaning the warehouse and for lavatory and urinal purposes. In respect of this supply, they had paid the respondents' water rates on the annual value of their premises in accordance with the scale specified in sect. 35 of the Act. These rates they paid down to the 25th of June in that year. They had also obtained water for a hydraulic lift at meter rates under an agreement between themselves and the company. This agreement was terminated by notice on the 23rd June 1886. Prior to that date the appellants required the respondents to supply them after the 25th of June with all the water which they needed for their premises by meter at the rate specified in the 41st section of the Act. The respondents refused so to supply them, and the question is whether they were entitled to make this demand.

My Lords, it has been my lot to attempt to construe many Acts of Parliament which were obscurely worded, but I do not think I ever met with one upon which it was more impossible to put a satisfactory construction than the statute with which we have to deal in the present case. If the object had been to render it as difficult of construction as possible, success could hardly have been more complete. I have read the series of enactments contained in the sects. 35 to 41 again and again, and it appears to me impossible to put any construction upon them which is not open to well founded criticism. In the view which I take it is not necessary to deal with many of those sections.

The real point which has to be determined is whether the appellants have made out that they are entitled to demand a supply by meter under the provisions of the 41st section. That section enacts, "That the company shall at the request of any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited or at their own instance afford a supply of water by means of a meter," "and may charge for such supply not exceeding the following rates per 1000 gallons." Then the rates are specified.

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The appellants contend that they have brought their case within this section. They seek to make it out in the following way:—First, they say that the words "for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited" may be read as "for purposes other than domestic purposes;" inasmuch as it is only for domestic purposes according to them that rates have been specified. Next, they say that the words which I have just read are to be taken in conjunction with the words "any consumer of water," which they immediately follow. And thirdly, they say that the words "any consumer of water" are to be construed as meaning "any person desirous of consuming or desirous of obtaining a supply of water." They would therefore read the section thus: "The company shall at the request of any person desirous of obtaining a supply of water for purposes other than domestic purposes, afford a supply" at the specified rates.

My Lords, I cannot think that construction is one which gives to the language used its natural meaning. I do not think that the words "any consumer of water" naturally mean any person desirous of consuming water. I think, on the contrary, their primâ facie meaning is, "any person consuming water;" I do not deny that the words might be shewn by reference to other provisions in the statute to have been used in that sense. One has known in some statutes the words "consumer of gas," and I am not sure that one may not have found the words "consumer of water" also, used in the sense for which the appellants contend, but if so construed, it must be because that construction is indicated as the correct one by the provisions of the Act, and the circumstances under which, and the collocation in which, the words are found.

Now, my Lords, the contention of the appellants really amounts to this, that *any person* (because it would be useless to put in the words "desiring a supply of water, or desiring to consume water," inasmuch as presumably a person who had not that desire would not make that demand) may demand and insist upon receiving a supply of water by meter for other than domestic purposes, that is, for trade purposes, or any purpose whatsoever.

My Lords, the result of such a construction is somewhat startling when one looks at the provisions to be found in the other parts of the Act. One is naturally led to turn first to the only other section in the Act which gives compulsory rights, I mean the 35th section, and turning to that section, one finds there a right is given in similar terms to demand a supply of water for domestic purposes. But to whom is that right given? It is strictly limited. It is given to the "owner or occupier of any house or part of a house in any street within their limits in which any pipe of the company shall be laid." All those conditions must be fulfilled to entitle him under the first part of that section to a supply of water for domestic purposes. The section goes on: "or any person who under the provisions of this Act or any Act incorporated therewith shall be entitled to demand a supply of water."

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That sends us to the 53rd section of the Waterworks Clauses Act 1847, which is incorporated in the New River Act. That section provides that "every owner and occupier of any dwelling-house, or part of a dwelling-house, within the limits of the special Act shall when he has laid such communication pipes as aforesaid, and paid or tendered the water-rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive" "a sufficient supply of water for his domestic purposes," so that when we are dealing with the right to demand a supply for domestic purposes, the persons entitled to make that demand are specifically described and limited. They must be persons answering the description of being owners or occupiers of a house or part of a house in any street within the limits where a pipe has been laid down by the company, or where they have laid a communication pipe. Those persons, and those persons alone, are entitled to demand a supply of water for domestic purposes; but in sect. 41 of the New River Company's Act, according to the construction contended for, no limitation is laid down at all. It is said that any person without regard to his owning or occupying premises within the limits and without regard to there being a pipe in the street or any other of the conditions which are prescribed in the general Act in the case of persons entitled to demand a supply for domestic purposes, is

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entitled to demand a supply of water for all other purposes whatsoever.

My Lords, one shrinks from a construction which would lead to such a conclusion as that. But when we turn to the 40th section, which immediately precedes that which we are construing, we find that when the legislature in relation to this Act intended to apply a provision to "any person," appropriate language was used, because the 40th section enacts: "That the company may supply any person or body within their limits with water to be used within such limits for other than domestic purposes at such rate and upon such terms and conditions as shall be agreed upon." My Lords, having used the words "any person or body within their limits" in the 40th section, if they meant the same thing in the 41st, why was not that language used? In the 40th section it is not without limit, "any person or body," it is "any person or body within their limits," and even the water so supplied by agreement is to be used within their limits. No such limitation is to be found according to the construction put upon sect. 41. It may be that the condition that it must be a person within their limits would be assumed, although an argument might certainly be raised upon the fact that when the legislature intended that limitation they had so expressed it. But it is not necessary to dwell upon that point, because the considerations to which I have alluded appear to me conclusively to shew that a consideration of the other provisions of the Act, so far from leading to the conclusion that the expression "any consumer of water" ought to have what is certainly not its primary meaning put upon it, leads to a conclusion exactly the reverse. I, therefore, feel constrained to reject the construction which has been put upon the words "any consumer of water" by the appellants. Unless they can establish that construction their case is at an end. They have not got over the difficulty which meets them at the threshold; and inasmuch as I think they have not brought themselves within these words, and therefore cannot be entitled to demand a supply of water under that section, it is unnecessary to consider any of the other questions which have been raised. I express no opinion, therefore, upon the meaning of the words which immediately follow those words and upon the question whether

those words so following ought to be attached to the words immediately preceding them or to be detached from them. These are matters which may possibly hereafter have to be considered, but they are not necessary for the decision of this case.

My Lords, upon the simple ground I have put, namely, that the appellants have not shewn that they come within the words "any consumer of water," I move your Lordships that the judgment appealed from be affirmed, and that this appeal be dismissed with costs.

LORD FITZGERALD:—

My Lords, I agree in the result announced, and also in the criticisms of my noble and learned friend on the woolsack upon this particular Act of Parliament. It might almost be said to be the result of malicious ingenuity if it had not been that probably the bill was submitted to a select committee, and we may take the contradictions in it as resulting from some effort at compromise in the course of the deliberations of that committee.

My Lords, I called attention in the course of the argument to what appeared to me to be the guiding principle of the Act as to the proper appropriation of the water to be supplied under this Act of Parliament. It is to be found in the 34th section. That section provides that: "The company shall cause main pipes to be laid down and pure and wholesome water to be brought to every part of the district within the limits of this Act whereunto they shall be required by so many owners or occupiers of houses," &c. What they have to do in the first place is to provide an ample supply of pure and wholesome water to be used for domestic purposes. In this contradictory Act we must put some construction upon the various parts of it, and I am inclined to think with my noble and learned friend when we come to look at the 41st section and the preceding section the appellant has failed to shew that he is a "consumer of water" for the purposes of sect. 41 and is entitled to put the powers of that section in force, assuming that they are mandatory upon the New River Company.

My noble and learned friend opposite (Lord Macnaghten) allowed me yesterday to read the judgment which he is about to deliver, and both in his criticisms of the Act and in the result he

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has arrived at I entirely agree. I consider it better to leave it in his hands than to endeavour to effect the same purpose by less forcible words.

LORD MACNAGHTEN:—

My Lords, in attempting to construe this curiously ill-drawn enactment, I cannot say that I have arrived at a conclusion which is quite satisfactory to my own mind. But I am satisfied that of all the constructions that can be suggested the one proposed by the appellants is the least eligible.

Before the Act of 1852 the New River Company were not under any positive obligation to supply water to any person or persons whatever. By the terms of their charter they were free to deal with whom they pleased. In every case the supply was matter of agreement. They had, as we learn from the preamble of the Act, "for many years past supplied a considerable portion of the Metropolis and parishes and places adjacent thereto with water for domestic and other purposes." They had therefore at the time customers who were consumers of water for domestic purposes and customers—not necessarily in all cases the same persons—who were consumers of water for other purposes.

The Waterworks Clauses Act 1847 had been passed but a few years before. It is plain I think from that Act that Parliament had been in the habit of imposing on the promoters of waterworks the obligation of supplying all owners and occupiers of dwelling-houses within their district with pure and wholesome water for domestic purposes, and it is evident that it was the intention of the legislature as a general rule that the same obligation should be imposed in the case of all similar undertakings in the future. But it is to be observed that, except in certain cases where a supply is required in the interest of the public, there are no provisions in the Waterworks Clauses Act pointing to the compulsory supply of water for non-domestic purposes.

In 1852 the New River Company came to Parliament for further powers and then Parliament put them under certain terms. The question is what those terms are? That question must of course be determined by the Act of 1852 construed according to the ordinary rules of interpretation. But I think

we may approach the Act with the presumption that the terms required would probably be in accordance with the scheme of the Waterworks Clauses Act, and that while compelling the New River Company to supply householders within their district with water for domestic purposes Parliament would leave them unfettered, or substantially unfettered, as regards the supply of water required for private non-domestic purposes.

The Act of 1852 incorporates the Waterworks Clauses Act with the exception of certain sections which are to be found in it in a somewhat modified form. The sections of the Act upon which the discussion turned are sects. 35 to 41 inclusive. Sects. 35 to 38 inclusive deal with the supply of water for domestic purposes. Sect. 35 gives the owner or occupier of any house or part of a house the right to demand a sufficient supply of water for domestic purposes at the rates thereinafter specified. A difficulty occurs there, because the rates specified are expressed to be rates "for water supplied to any dwelling-house," and the question at once arises whether the word "house" in the earlier part of the section has a more extended meaning than the word "dwelling-house" which is used in the latter part. I am disposed to think the two expressions are synonymous, and that it is only to the owner or occupier of a dwelling-house or part of a dwelling-house (whatever the term "dwelling-house" may mean) that this right is given. Whether the appellant's house is or is not a dwelling-house within the meaning of the Act is a different question, and one upon which I do not think it is necessary to express an opinion.

I then come to sect. 40. That section has, I think, an important bearing on the present question, because it seems to recognise the right of the company within their district to deal in the supply of water for non-domestic purposes without being subject to any compulsion in that respect.

Then follows sect. 41 on which the question mainly depends. The appellants claim under that section the right to a supply of water by meter for domestic purposes. Their contention is that although the purposes for which they require the supply are domestic purposes they are not purposes in respect of which the rates mentioned in sect. 35 are provided, because they say that

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their house is not a dwelling-house, and in their view those rates are only applicable to the supply of water for domestic purposes in a dwelling-house. But to bring themselves within sect. 41 the appellants must make out that they are consumers of water. The rights given by sect. 41, whatever they are, are given only to consumers of water. The appellants say that the expression "any consumer of water" in that section means any person who wishes or proposes to become a consumer of water. I must say I think that is doing too great violence to the language. I agree with the Court of Appeal that the expression "any consumer of water" must mean a person who is actually consuming water or who, at the least, is entitled to demand a supply of water for his consumption, and is taking the necessary steps to obtain it.

I may add that besides doing violence to the language of sect. 41 the contention on behalf of the appellants seems to be open to the objection that it renders sect. 40 wholly nugatory. It would in effect compel the company to supply water at meter rates for non-domestic purposes, whatever those purposes might be, to every person or body within their district. I cannot find anything in the Act to shew that it was the intention of Parliament to impose on the company an obligation which would be so great a departure from the scheme of the Waterworks Clauses Act, and which might have the effect of seriously interfering with that which was evidently the first and principal object of the legislature—the supply of pure and wholesome water for domestic purposes

I am therefore of opinion that the appeal must be dismissed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 9th August 1889.

Solicitors for appellants: *Phelps, Sidgwick & Biddle.*
Solicitors for respondents: *Thompson & Debenhams.*

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BENEFICE—*Resignation—Validity—Acceptance—Condition—Pecuniary Consideration—Simoniacal Contract—Revocation before Acceptance.*] A present resignation by a parson of his benefice, executed by deed before witnesses and placed in the hands of the Ordinary, the Ordinary agreeing to postpone formal acceptance till a day named, is valid and cannot be revoked.—Scandal having arisen with regard to the conduct of a vicar, he was informed by the Bishop that he must either submit to an inquiry or cease to hold his benefice. Thereupon, in accordance with a proposal made by the Bishop in the interest of the parish and in mercy to the vicar, the vicar on the 2nd of June executed before witnesses, but not before a notary, an unconditional deed of resignation and sent it to the Bishop's secretary on the understanding that the Bishop would postpone formal acceptance until the 1st of October. On the 10th of June the vicar executed a deed cancelling and revoking the deed of resignation, and on the 16th of July he communicated the fact to the Bishop's secretary. The Bishop after the revocation signed a document dated the 1st of October accepting the resignation and declaring the vicarage void.—The vicar having brought an action against the Bishop and the patrons of the benefice claiming a declaration that he was vicar, that the resignation was void, and an injunction to restrain the defendants from treating the benefice as vacant:—*Held*, affirming the decision of the Court of Appeal (35 Ch. D. 48), that the resignation was voluntary, absolute, validly executed,

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and irrevocable; and that the action could not be maintained. REICHEL *v.* BISHOP OF OXFORD [259

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BRITISH GUIANA, LAW OF—*Will—Construction—Power of substituting Executors.*] The testator by his will appointed four persons therein named (the two last taking in succession), to be executors for the purpose of discharging his debts and paying legacies, and administrators (with all the powers by law and custom incident to that office) of his residuary estate, giving and granting to them all certain powers therein described, and "also the powers of assumption, surrogation, and substitution to any of them, to the two last surviving of them, and to any by them assumed, surrogated, and substituted for the purposes aforesaid":—*Held*, that the plain intention of the testator was to provide for the continuous management of his estate by a series of private administrators, and to give a power of substitution to the two last survivors of the said four persons. Consequently the nomination of the Administrator-General by one who was not one of the two last survivors was null and void as being contrary to the terms of the will. FARNUM *v.* ADMINISTRATOR-GENERAL OF BRITISH GUIANA. WILLEMS *v.* ADMINISTRATOR-GENERAL OF BRITISH GUIANA - - - - 651

CANADA, LAW OF—*British Columbia—British North America Act*, 1867, *s.* 109—*Rights of the Province to the Precious Metals—Conveyance of "Public Lands"—Construction.*] *Held*, that a conveyance by the Province of British Columbia to the Dominion of "public lands," being in substance an assignment of its right to appropriate the territorial revenues arising therefrom—does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon, and under such lands are not incidents of the land but belong to the Crown, and, under sect. 109 of the British North America Act of 1867, beneficially to the Province, and an intention to transfer them must

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be expressed or necessarily implied. ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* ATTORNEY-GENERAL OF CANADA - - - - 295

2. —— *Ontario—British North America Act, 1867, s. 109—Lands reserved to the Indians—Rights of the Province.*] Sect. 109 of the B. N. A. Act of 1867 gives to each Province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, subject to such rights as the Dominion can maintain under sects. 108 and 117.—*Attorney-General of Ontario* v. *Mercer* (8 App. Cas. 767) followed.—By royal proclamation in 1763 possession was granted to certain Indian tribes of such lands, "parts of our dominions and territories," as, not having been ceded to or purchased by the Crown, were reserved, "for the present," to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the governor of the colony in which the lands lie, and not by any private person.—In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until that date under the said proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the Government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing: —*Held*, that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Crown; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was "an interest other than that of the Province in the same," within the meaning of sect. 109.—*Held* also, that by force of the said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the Province in terms of sect. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein. ST. CATHERINE'S MILLING AND LUMBER COMPANY *v.* THE QUEEN - - - 46

3. —— *Quebec—Law of Lower Canada—C. C. 1260, 6, 63—Domicil.*] An acte de mariage in 1828, signed by husband and wife, recited that the husband was a day labourer of the city of Quebec:—*Held*, that this did not amount to a binding declaration by the husband that he was domiciled in Lower Canada with the legal effect of a contract that the wife should be commune en biens with him. Domicil for purposes of marriage in sect. 63, C. C., is used in the sense of residence. —Art. 1260, C. C., is subject to art. 6. If no covenants are made, the consorts, so far as the Code applies, are presumed to have subjected themselves to the legal community of property. But moveable property is governed by the law of the owner's international domicil. MCMULLEN *v.* WADSWORTH - - - - 631

4. —— *Quebec—Law of Lower Canada—Art. 1975 C. C.—Pledge—Tender—Unilateral Contract—Construction.*] Where the owner of a thing pledged for a specific debt tenders the amount of the debt and the creditor is unable to restore it; *held*, that the tender cannot be regarded as insufficient under art. 1975 C. C., which gives a right to detain for other debts of the owner.—Where a document purports to be a unilateral contract, binding the signatories for an indefinite time to sell certain specified debentures of a company to one of its officers at a specified price; but the circumstances under which it was executed shewed that the real intention of the signatories was to limit for their common benefit their claims against the company, in order to facilitate some financial operation then contemplated:—*Held*, that such intention controlled its effect, and that it could not be treated as an agreement for sale, for the benefit of such purchaser. SENÉCAL *v.* PAUZÉ - - - - - - 637

5. —— *Quebec—Public Lands Act of 1869, s. 16—Rights of Holder of Location Ticket—Timber-cutting Licences.*] Where the plaintiffs had obtained a location ticket from the Crown of lands within the ambit of a forest reserve proclaimed by the Crown under the Forest Act of 1883, which prohibited any grant of them by the Crown:—*Held*, that, under sect. 16 of the Public Lands Act of 1869 (32 Vict. c. 11), the plaintiffs were in possession of land for valuable consideration given by them to the Crown, and (whatever the infirmities of the Crown's title) had a right under the Injunction Act of 1878 to be protected against the defendants who held a timber-cutting licence from which the plaintiffs' land was excepted. GILMOUR *v.* MAUROIT. GILMOUR *v.* ALLAIRE - - - - - - 645

6. —— *Quebec—Law of Lower Canada—Riparian Rights—River tidal and navigable—Obstruction to accès et sortie—Right of Action.*] The appellants made a railway upon the foreshore of a tidal and navigable river by means of an embankment extending along the entire length of the respondents' frontage, cutting off all access to the water from the respondents' land except through one opening left in the said embankment and another opening just outside the respondents' boundary:—*Held*, that, by the French law prevailing in Lower Canada, the respondents as riparian owners had the same rights of accès et sortie as they would have had if the river had not been navigable; that the above obstruction to such rights without parliamentary authority was an actionable wrong; that the substituted openings above-mentioned were no answer to a claim for indemnity.—There is no distinction in principle between riparian rights on the banks of navigable or tidal, and on those of non-navigable rivers. In the former case, however, there must be no interference with the public right of navigation; and in order to give rise to riparian rights the land must be in actual daily contact with the stream, laterally or vertically.—*Lyon* v. *Fishmongers' Company* (1 App. Cas. 662) followed and held to be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the lex loci.—*Held*, that under the Quebec Railway Consolidation Act, 1880, sect. 9, no authority is given to a railway company to exercise its powers in such a manner as to inflict substantial damage upon land not taken without

CANADA, LAW OF—*continued.*

compensation:—*Held*, further, that as the appellants had not taken the steps necessary under the Act of 1880, to vest in them the power to exercise the right or do the thing for which compensation would have been due under the Act, an action by the respondents for damages and the removal of the obstruction, would lie; in which if the obstruction were not ordered to be removed damages as for a permanent injury to the land could be recovered.—*Corporation of Parkdale* v. *West* (12 App. Cas. 602) followed. NORTH SHORE RAILWAY COMPANY *v.* PION - - - - 612

7. —— *Quebec—Quebec Act*, 40 *Vict. c.* 60, *ss.* 323, 326, *and* 327—*Taxable Property of Railway—Practice—Special Leave.*] *Held*, that by the true construction of sects. 323, 326, and 327 of Quebec "Town Corporation General Clauses Act, 1876" (40 Vict. c. 60), no part of a railway is made taxable property, except the land as land occupied by the road, the bridges or other superstructures thereon being excluded.—Where special leave to appeal is granted on the ground that the appellant desires to raise a particular question of great and general importance, he cannot be permitted at the hearing to say that no such question arises, and to argue that the case turns upon a question of fact, on which the court below was in error. Accordingly the appellant town corporation was precluded from contending that, as matter of fact, the assessment in question had been confined to the land occupied by the road. CORPORATION OF ST. JOHN'S *v.* CENTRAL VERMONT RAILWAY COMPANY - - - - 590

CANAL COMPANY—*Right to Support—Mines under or near Canal—Compensation for not working Mines—Right of Action for Injury to Canal*] By a section of an Act empowering a company to make a canal it was provided that nothing therein contained should affect the right of any owners of lands to the mines and minerals under the lands to be made use of for the canal, and that it should be lawful for such owners to work such mines and minerals, not thereby injuring, prejudicing or obstructing the canal. By another section it was provided that if the owners should in pursuing such mines work near or under the canal so as in the opinion of the canal company to endanger or damage the same, or in the opinion of the owners of the mines to endanger or damage the further working thereof, it should be lawful for the canal company to treat and agree with the owners for all such minerals as might be near or under the canal as should be thought proper to be left for the security of the canal or mines; and in case they should disagree then it should be lawful for certain commissioners at the request of the canal company or of such owners to summon a jury to assess what satisfaction such owners ought to receive from the canal company: and upon payment of such satisfaction such owners should be perpetually restrained from working such mines within the limits for which satisfaction should by the jury be declared to extend.—Owners of a coal mine under and near the canal having given the canal company notice that they were going to work the coal, the company declined to purchase or pay compensation for leaving the coal, and the owners then worked the coal and thereby damaged

CANAL COMPANY—*continued.*

the canal. The working was in the usual mode, without negligence and without doing unnecessary damage save in not leaving sufficient support:—*Held*, affirming the decision of the Court of Appeal (20 Q. B. D. 391), that the owners of the mine had a right under the Act to initiate proceedings and to receive satisfaction for such minerals as should be thought proper to be left for the security of the canal or the mine, but were liable in damages for working the mine to the injury of the canal.—*Dudley Canal Co.* v. *Grazebrook* (1 B. & Ad. 59) distinguished.—*Cromford Canal Co.* v. *Cutts* (5 Railw. Cas. 442) approved. KNOWLES & SONS *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY - - - - - 248

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COMPANY — *Capital partly paid up — Preference Shareholders—Winding up—Surplus Assets —Distribution according to Subscribed Capital —Companies Act*, 1862 (25 & 26 *Vict.* c. 89) s. 133 *sub-ss.* 1, 10.] The articles of association of a limited company incorporated under the Companies Act 1862 provided that the net profits of each year should be divided pro ratâ upon the whole paid-up share capital and that the directors might declare a dividend thereout on the shares in proportion to the amounts paid up thereon. The articles contained no provisions as to the distribution of assets on the winding-up of the company. The original capital consisted of ordinary shares, partly paid up. Afterwards preference shares were issued entitling the holders to a dividend at a fixed rate with priority over all dividends and claims of the ordinary shareholders. The preference shares were fully paid up. The undertaking having been sold under an Act which made no provision for the distribution of the purchase-money among the shareholders, the company was voluntarily wound up and assets remained for distribution:—*Held*, reversing the decision of the Court of Appeal and varying the order of North, J. (39 Ch. D. 1), that in distributing the assets "amongst the members according to their rights and interests in the company," and in adjusting "the rights of the contributories

COMPANY—*continued.*

amongst themselves" (under 25 & 56 Vict. c. 89, s. 133, sub-ss. 1, 10), the liability of the ordinary shareholders for the unpaid balance of their shares must not be disregarded; and that after discharging all debts and liabilities and repaying to the ordinary and preference shareholders the capital paid on their shares, the assets ought to be divided among all the shareholders, not in proportion to the amounts paid on the shares, but in proportion to the shares held. BIRCH *v.* CROPPER. *In re* BRIDGEWATER NAVIGATION COMPANY - - - - - - - 525

2. —— *Misrepresentation in Prospectus—Action of Deceit—False Representation—Fraud—"Legal Fraud"—Company.*] In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.—A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit.—A special Act incorporating a tramway company provided that the carriages might be moved by animal power, and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by their special Act the company had the right to use steam power instead of horses. The plaintiff took shares on the faith of this statement. The Board of Trade afterwards refused their consent to the use of steam power and the company was wound up. The plaintiff having brought an action of deceit against the directors founded upon the false statement:—*Held*, reversing the decision of the Court of Appeal and restoring the decision of Stirling J. (37 Ch. D. 541), that the defendants were not liable, the statement as to steam power having been made by them in the honest belief that it was true. DERRY *v.* PEEK - - - - - - - 337

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COPYRIGHT—*continued.*

on the top which had the same effect.—*Held*, first, that the Court of Session (15 Court Sess. Cas. 4th Series, 660), in considering whether there had been an infringement of the copyright in the design for the shape of the fire-door were wrong in taking into account the question whether the defenders' design accomplished the same useful object (i.e., that of excluding cold air) as the design of the pursuers; but secondly, affirming the decision of the Court of Session, that there had been in fact an obvious imitation of the registered design and therefore an infringement of the copyright. Hecla Foundry Company *v.* Walker, Hunter, & Co. - - - 550

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EVIDENCE—*Hearsay Evidence—Parish Registers—Public duty to keep Registers—Pedigree—Proceedings between Strangers—Declaration of deceased Relations—Res inter alios acta.*] Scotch parish registers or certified extracts from them, receivable in Scotch Courts as kept under the sanction of public authority, are receivable in English Courts as to matters properly and regularly recorded in them.—Proceedings in a Sheriff's Court in Scotland held admissible as to matters of pedigree, on the same principle on which answers and decrees in Chancery have been admitted by the House in Peerage Cases, the facts of the pedigree not being in dispute but only incidentally stated in the proceedings. Lyell *v.* Kennedy. Kennedy *v.* Lyell - - - - - - 437

—— Entry against interest - - - 423
See Limitations, Statute of. 1.

EXECUTOR—Substitution of—Law of British Guiana - - - - 651
See British Guiana, Law of.

FOG—Collision - - - - 670
See Ship. 3.

FORFEITURE—Deposit - - - 429
See Vendor and Purchaser.

FRAUD—Legal—Definition of - - 337
See Company. 2.

FRIVOLOUS PLEADINGS - - - 665
See PRACTICE—SUPREME COURT. 2.

FURNITURE—Liability of trustees—Scotch law
See SCOTCH LAW. 4. [576

GENERAL AVERAGE - - - 601
See SHIP. 5.

GENERAL ORDER, August, 1882, rr. 2, 4, 6, Sched. I., Part I., r. 11 - - 1
See SOLICITOR.

GUARANTEE—Ship's capacity—Charterparty
See SHIP. 1. [106

HIGHWAY—Carried over railway by bridge—Repairs of bridge - - - 417
See RAILWAY COMPANY.

HONDURAS, LAW OF—*Mortmain Act* (9 *Geo.* 2, *c.* 36)—*Introduction of English Law.*] *Held*, that, on the true construction of the local Acts and Ordinances, the Mortmain Act (9 Geo. 2, c. 36), has not been introduced into British Honduras. Although the said Act is included in the description of laws thereby introduced, yet its provisions do not satisfy the prescribed condition of applicability to the colony.—*Attorney-General* v. *Stewart* (2 Merivale, 143), and *Whicker* v. *Hume* (7 H. L. C. 134) approved. JEX *v.* MCKINNEY - 77

HUSBAND AND WIFE—Administration by husband—Law of Victoria - - 307
See VICTORIA, LAW OF. 1.

IMPROVEMENT OF LAND—Scotch law—Charge on land - - - - 139
See SCOTCH LAW. 1.

INCOME TAX—*Inland Revenue—Insurance Company, Life—Mutual Insurance—Return of Premium—Bonuses—Trading—Annual Profits or Gains—16 & 17 Vict. c. 34, Sched. D.*] A life insurance company had no shares or shareholders. The only members were the holders of participating policies, each of whom was entitled to a share of the assets and liable to all losses. A calculation was made by the company of the probable death rate among the members and of the probable expenses and other liabilities, and the amount claimed for premiums from members was commensurate therewith. An account was annually taken and the greater part of the surplus of such premiums over expenditure referable to these policies was returned to the policy-holders as bonuses, either by addition to the sums insured or in reduction of future premiums. The remainder of the surplus was carried forward as funds in hand to the credit of the general body of the members. It being admitted that the income derived by the company from investments, and from all transactions with persons not members, was assessable to income tax:—*Held*, by Lords Watson, Bramwell, Herschell and Macnaghten, Lord Halsbury, L.C. and Lord FitzGerald dissenting, that no part of the premium income received under participating policies was liable to be assessed to income tax as profits or gains under schedule D: and that *Last* v. *London Assurance Corporation* (10 App Cas. 438) was distinguishable, the income in that case being derived from transactions with persons not members and not (as in the present case) from

INCOME TAX—*continued.*

mutual insurances between members only:—*Held*, by Lord Halsbury L.C and Lord FitzGerald, that *Last* v. *London Assurance Corporation* governed the present case, and that the surplus returned or credited to members was liable to income tax. NEW YORK LIFE INSURANCE COMPANY *v.* STYLES [381

2. —— *Inland Revenue—Person resident in the United Kingdom—Trade carried on Abroad—Profits arising or accruing—Profits not remitted to the United Kingdom—5 & 6 Vict. c. 35, ss. 39, 100, 106, 108—16 & 17 Vict. c. 34, s. 2, Sched. D.*] A person resident in the United Kingdom and engaged in a trade carried on entirely abroad is liable to income tax in respect of so much only of the profits of that trade as are received in the United Kingdom.—The respondent, who resided solely in England, was a partner in a firm which carried on business in Australia. Profits were made by the firm, and a portion of the respondent's share thereof was remitted to him in England and on this portion he paid income tax under Sched. D. The larger portion of his share was not remitted to him in England, but was placed to his credit in Australia:—*Held*, affirming the decision of the Court of Appeal (21 Q. B. D. 52) but not for the reasons given by the majority of that Court, that the case fell under the head of "possessions in any of Her Majesty's dominions out of Great Britain, or foreign possessions" dealt with by the fifth case of Sched. D in 5 & 6 Vict. c. 35, s. 100; and that the respondent's portion of profits not received in the United Kingdom was not liable to income tax. COLQUHOUN *v.* BROOKS [493

INDIANS—North American—Reserved lands 46
See CANADA, LAW OF. 2.

INSURANCE COMPANY—Income tax—Return of premium - - - - 381
See INCOME TAX. 1.

INSURANCE, FIRE—*Option of Insurers to terminate Policy on giving Notice—Construction of Condition—Practice—Costs.*] A policy of insurance against fire was issued subject to the conditions, first, that it should not apply to any portion of the subject of insurance which should, by reason of some act done after its date without the consent of the insurers, be exposed to increased risk of fire, or removed to a building or place other than that described in the policy; second, that the insurers might terminate it by notice if "by reason of such change, or from any other cause whatever," they should desire to do so, refunding to the insured a rateable proportion of the premium for the unexpired time of the policy:—*Held*, that the insurers had, by force of this condition, the option of terminating the policy at will.—Costs of successful appeal not ordered, being below the appealable value, and special leave having been given on the ground that its decision was of general importance to insurance offices like that of the appellant. SUN FIRE OFFICE *v.* HART - - - - 98

INSURANCE, MARINE—"*Open Cover*"—*Refusal of Policies in Terms of Cover—Specific Performance.*] An open cover, or proposal to insure before the goods to be insured are shipped, was

INSURANCE, MARINE—*continued.*
given by the respondents to M. in order that he might give it to the charterer, who after shipment applied for policies to the amount mentioned in the cover and was refused:—*Held*, that such application constituted an acceptance of a subsisting proposal, and that there was a binding contract with the charterer to issue a policy in terms of the open cover. The asking for two policies did not prevent the acceptance being sufficient, as there was a refusal to give any. BHUGWANDASS *v.* NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA - - - 83

INTEREST—Payment of—Statute of Limitations—Evidence - - - - 423
See LIMITATIONS, STATUTE OF. 2.

INVESTMENT—Liability of trustees—Scotch law
See SCOTCH LAW. 3. [558

JERSEY, LAW OF—*Valid Codicil to a Void Will—Competency of Witness.*] The laws of Jersey are derived from those of Normandy, where the Roman law, including that respecting codicils following the conditions of the testament, and being void where the latter is annulled, did not prevail.—Where a will was held by the law of Jersey to be null and void by reason of incompetent attestation:—*Held*, that a validly executed codicil did not fall with the will, and that the residue disposed of by the codicil included all the legacies given by the will.—A witness to a will, incompetent by reason of relationship to a legatee, is a competent witness to a codicil under which the said legatee did not take, and in a suit to which the said legatee is not a party. FALLE *v.* GODFRAY - - - - - - 70

JETTISON - - - - - - 601
See SHIP. 5.

LAND—Injuriously affected—Compensation 153
See LANDS CLAUSES ACT.

LANDS CLAUSES ACTS—*Lands Clauses Consolidation Act* 1845 (8 *&* 9 *Vict. c.* 18) *ss.* 49, 63—*Compensation for "injuriously affecting" other Lands—Severance of Lands—Damage by exercise of Statutory Powers—Nuisance—Part of Building Estate taken for Sewage Works—Value of other Parts thereby depreciated—"Lands held therewith."*] Under statutory powers incorporating the Lands Clauses Consolidation Act 1845 the respondents gave the appellant notice to treat for the purchase of part of his land, which they required for sewage works. In an inquisition held under that Act evidence was given that the existence of sewage works, even if conducted so as not to create an actionable nuisance, depreciated the market value of the appellant's other lands for building purposes. The land taken was let on long building leases; of the other lands part was in hand, and part was let for short periods for brick-making. The land taken was separated from the other lands, in part by other property of the appellant's, and in part by a railway. The jury gave a verdict for the value of the land taken and a further sum for all damage sustained or to be sustained by reason of the injuriously affecting the other lands by the exercise of the respondents' statutory powers:—*Held*, that the jury had not

LANDS CLAUSES ACTS—*continued.*
exceeded their jurisdiction in awarding the further sum. For, first, part of the appellant's land having been taken for the sewage works, compensation might be awarded for damage to be sustained by reason of the injuriously affecting his other lands, not only by the construction of the sewage works but by their use;—Secondly, the damage was not too remote to form the subject of compensation, even though no nuisance might be caused;—Thirdly, the lands taken and the lands injuriously affected being held by the same owner so that the unity of ownership conduced to the advantage of the property as one holding, the lands injuriously affected were "held with" the lands taken within the meaning of sect. 49 of the Lands Clauses Consolidation Act 1845.—The decision of the Court of Appeal (*Reg.* v. *Essex*, 17 Q. B. D. 447) reversed, and the decision of Mathew and Day JJ. (14 Q. B. D. 753) restored.—*In re Stockport, Timperley and Altrincham Ry. Co.* (33 L. J. (Q.B.) 251) approved.—By Lord Watson: Where several pieces of land owned by the same person are, though not adjoining, so near to each other and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Lands Clauses Consolidation Act 1845 ss. 49, 63; so that if one piece is compulsorily taken and converted to uses which depreciate the value of the rest the owner has a right to compensation for the depreciation. COWPER-ESSEX *v.* LOCAL BOARD FOR ACTON - - - 153

LANDS CLAUSES ACT—Law of Natal - 331
See NATAL, LAW OF.

LEASE—*Restrictive Covenant—Representations—Collateral Agreement.*] S. purchased from Commissioners by several conveyances the fee simple of several houses forming one block of buildings upon a site laid out in accordance with a building scheme, each conveyance containing a covenant by S. not to carry on or permit to be carried on upon the premises conveyed any trade or business but to keep the house as a private dwelling-house only, and not to do or suffer to be done upon the premises conveyed anything which might grow to the annoyance of any person who might be or become the owner, tenant, or occupier of any part of the premises then or late belonging to the Commissioners. S. afterwards granted to the respondent a lease of one of the houses containing a restrictive covenant of the same nature and a block plan of the houses. During the negotiations for the lease statements were made by S.'s solicitors to the respondent whereby he became aware that similar restrictive covenants were contained in all the leases granted by S. of houses in that block and also became aware of the terms of the conveyances of the respondent's house from the Commissioners to S.:—*Held*, affirming the decision of the Court of Appeal (34 Ch. D. 1) but on a different ground, that although the statements made to the respondent did not amount to a collateral contract with him as to the future management of the estate, the respondent was from the nature of the transaction entitled to an injunction restraining S. from authorizing any of the other houses in the block to be used for the purpose of trade.—The principles defined by Hall

LEASE—*continued*
V.-C. in *Renals* v. *Cowlishaw* (9 Ch. D. 125, 129; affirmed on appeal 11 Ch. D. 866, 869) approved. SPICER *v.* MARTIN - - - - 12

LIBEL - - - - - - 194
See DEFAMATION.

LIEN—Maritime—Disbursements - - 209
See SHIP. 4.

—— Maritime—Salvage—General average 601
See SHIP. 5.

LIMITATIONS, STATUTE OF—*Action to recover Land—Possession of Heir-at-Law—Receipt of Rents by Agent—Agent and Receiver—Agent de son Tort—Ratification by Owner—Trustee—3 & 4 Will. 4, c. 27 ss. 8, 9, 34—37 & 38 Vict. c. 57, s. 1.*] During the life of D., owner in fee of land which was let to tenants from year to year and week to week, the property was managed by the defendant as her agent, the defendant receiving the rents and paying them into a separate ear-marked account at his own bank. D. having died intestate in 1867, the defendant continued to receive the rents and pay them into the bank exactly as before, not informing the tenants of D.'s death, but stating to several persons that he was acting as agent and receiver for the true heir whoever he might be. The defendant thus acted till 1880, when, more then twelve years having elapsed after D.'s death, he claimed the property on his own account. The assignee of D.'s heir having in 1881 brought an action against the defendant to recover possession of the land and for an account of the rents and profits:—*Held*, reversing the decision of the Court of Appeal (18 Q. B. D. 796) and restoring the decision of Stephen J., that as to the land the acts of the defendant in receiving the rents as agent for the heir could not dispossess the heir so as to put him to his action under ss. 2 and 3 or s. 8 of 3 & 4 Will. 4 c. 27; that the defendant's acts as such agent though unauthorized might be ratified by the true owner, and were ratified by the plaintiff bringing his action within a reasonable time after the heir was ascertained; that as to the accumulated rents and profits the defendant had made himself a trustee; that the action was not barred by the Statutes of Limitation; and that the plaintiff was entitled to judgment for the recovery of possession of the land and to an account of the rents and profits since D.'s death. LYELL *v.* KENNEDY. KENNEDY *v.* LYELL - - - - - - 437

2. —— *Evidence—Entry against Interest—Payment of Interest—Agency.*] The decision of the Court of Appeal as to the equitable mortgage (33 Ch. D. 127) affirmed, not for the reasons given by that Court, but because, without pronouncing any opinion on the question arising under the Statute of Limitations and assuming the entry in question to be admissible, there was no evidence to connect the entry with the property in question. NEWBOULD *v.* SMITH - - - 423

MARGINAL NOTE—Charterparty - - 106
See SHIP 1.

MASTER AND SERVANT—Contract to do dangerous work - - - 179
See NEGLIGENCE

MAXIM OF LAW—"Volenti non fit injuria."
See NEGLIGENCE. [179

MINE—*Wages—Payment by Weight of Mineral—Mineral contracted to be gotten—Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 17.] Persons were employed in a mine under a contract that coals should be paid for at 1*s.* 6*d.* per ton, and heading slack at 7*d.* per ton, no other slack to be paid for: all other slack to be deducted from the different places in proportion to their loading, and a premium of 2*d.* a ton on the coal to be paid to all those places whose boxes of coal did not contain an average of more than 112 lbs. of dust each per week.—The coal (including the slack gotten) was weighed close to the pit's mouth, and was then sorted and carried forty yards and shot on to a screen, more slack being caused by the operations: a note of the slack which passed through the screen was taken by a person employed only by the mine-owners, and the weight of the slack was deducted from the weight at the pit's mouth. The wages of the miners were paid according to the weight of the coal after thus deducting the slack.—In an action by the miners to recover from their employers the difference between the wages so ascertained and the full wages if no such deduction had been made:—*Held*, affirming the decision of the Court of Appeal (20 Q. B. D. 606), that the miners were entitled to recover:—By Lord Halsbury L.C. and Lords Herschell and Macnaghten:—Because by the contract the amount of wages paid depended "on the amount of mineral gotten" within the meaning of sect. 17 of the Coal Mines Regulation Act 1872 (35 & 36 Vict. c. 76), but the miners were not paid "according to the weight of the mineral gotten," nor was "such mineral truly weighed accordingly," within the meaning of that section; for "the mineral contracted to be gotten" was coal including slack, and slack was not "material other than mineral contracted to be gotten," and was therefore not one of the deductions allowed by that section:—By Lords Bramwell and FitzGerald:—Because though the deductions were not in contravention of sect. 17, the weights were not ascertained in the manner required by sect. 18. NETHERSEAL COLLIERY COMPANY *v.* BOURNE - - 228

—— Under canal—Right to support - - 248
See CANAL COMPANY.

MISREPRESENTATION—Prospectus of company
See COMPANY. 2. [337

MORTGAGE—*Proviso of Redemption—Construction—Reconveyance to be of Original Estates of Mortgagors.*] Where in a deed of mortgage it was recited that the mortgagor was entitled under his father's will to a life estate in the hereditaments comprised in the said deed, with remainder to his children as tenants in tail general, with cross-remainders between them, and that for the purpose of increasing the mortgagee's security one of his daughters and her husband (parties thereto of the second part) had agreed to bar the estate tail in remainder vested in them, the reconveyance to be made to the mortgagors respectively according to their original respective estates and interests therein:—*Held*, that, according to the true construction of the proviso for redemption, the parties were entitled to a recon-

MORTGAGE—*continued.*
veyance of the estates as originally created by the will, and not as altered for the purposes of the mortgage. Plomley *v.* Felton - 61
—— Deposit of deeds—Detinue - - 273
See Victoria, Law of. 2.

MORTMAIN—Law of British Honduras - 77
See Honduras, Law of.

MUTUAL INSURANCE COMPANY—Income tax —Return of premium - - 381
See Income Tax. 1.

NATAL, LAW OF—*Lands Clauses Consolidation Law, No.* 16 *of* 1872—*Lands taken under Statutory Compulsion—Demand of Transfer from the Owner.*] Under the Natal Lands Clauses Consolidation Law, No. 16 of 1872, there is no power to demand a transfer from the owner of lands taken from him by virtue of a reservation in his Crown grant or under statutory compulsion. If such lands are taken under condition of compensation the owner may at his option execute a transfer, but no action lies to compel him, and such transfer can only be obtained by following the procedure prescribed by the said law of 1872. Colonial Secretary of Natal *v.* Behrens [331

NEAREST OF KIN—Scotch law - - 124
See Scotch Law. 2.

NEGLIGENCE—*Contract by Servant with Master to do Dangerous Work on Defendant's Premises—Contractor—Breach of Duty—Maxim "Volenti non fit injuria."*] A railway company agreed with a contractor that he should shunt their trucks upon their line and should supply horses and men for that purpose, the company to provide boys to assist in the shunting when they had boys, and when they had not the shunting to be done without boys. For several years the plaintiff as the servant of the contractor shunted trucks on the company's line, sometimes with and sometimes without boys. The operation of shunting is dangerous to any man performing it without assistance. The plaintiff on one occasion asked the company's foreman for a boy, but as the company could not provide one proceeded to shunt trucks alone and without any negligence on his part was injured by a truck running over him. In an action by him against the company:—*Held,* that there was no evidence for the jury of any negligence or breach of duty on the part of the railway company towards the plaintiff, and that he had therefore no cause of action.—*Held,* also, by Lord Halsbury L.C. and Lord Bramwell:—That the plaintiff was also prevented from recovering because he had voluntarily done the work with full knowledge of the risk he ran. By Lord Bramwell:—Where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim Volenti non fit injuria applies. Membery *v.* Great Western Railway Company - - - - 179
—— Evidence of - - - - 40
See Ship. 2.

NEW SOUTH WALES, LAW OF—*Crown Lands Act of* 1884, *ss.* 76, 78—*Pastoral Lease of Leasehold Area—Rent runs from Date of Notification.*] *Held,* that in respect of pastoral leases of leasehold areas granted under the Crown Lands Act of 1884, the rent reserved therein is in all cases, by virtue of the provisions of that Act, to be computed from and be payable from the date of the notification issued under sect. 76 of that Act, at which date the right to hold at the rents reserved in leases granted under former Land Acts is determined. Reid *v.* Garrett - - 94

2. —— *Crown Grants of Land—Right to resume—Rule against Perpetuities inapplicable to Crown Grants in the Colony.*] *Held,* that a reservation in a Crown grant made in 1823 of land in New South Wales of a right to resume any quantity thereof not exceeding ten acres, as may be required for public purposes, does not constitute an exception repugnant to the grant and therefore void. Such resumption when carried into effect operates as a defeasance.—*Held,* further, that whether or not the Crown in England would be affected by the rule against perpetuities, such rule was nevertheless inapplicable in 1823 to Crown grants of land in the Colony or to reservations or defeasances in such grants to take effect on some contingency more or less remote and only when necessary for the public good. Cooper *v.* Stuart - - - - - 286

3. —— *New South Wales Act, No.* 25, *s.* 1—*Declaration by Attorney.*] By New South Wales Act, No. 25, s. 1, a declaration made by an attorney that he has no notice of the revocation of his power by death or otherwise is conclusive proof of non-revocation, when made to a bonâ fide purchaser for valuable consideration without notice of any such revocation:—*Held,* that a general verdict against such purchaser in an action to recover the property was justified by evidence to the effect that such purchaser had cause to suspect and did suspect the truth of such declaration; and that an order refusing a new trial must be affirmed. Mutual Provident Land Investing and Building Society *v.* Macmillan [596

4. —— *Practice—Amendment of Rule Nisi refused—Discretion of Court.*] Where at the trial both parties treated an issue as one which should be decided by the judge and not by the jury, and the appellants afterwards obtained a rule nisi for a new trial on the ground that the judge had decided it wrongly:—*Held,* that the Court below exercised a right discretion in refusing to amend the rule nisi by stating that the judge should have left such issue to the jury. Australian Steam Navigation Company *v.* Smith & Sons - - - - - 318

5. —— *Practice—Cross Actions tried separately—Contradictory Verdicts—Motion for New Trial.*] Where cross actions involving the same questions of law and fact are separately tried with the result that contradictory verdicts are obtained if the evidence at each trial is so fairly balanced that a jury might reasonably find either way both cases ought to be tried again, not separately but together. The Court in such a case c neither be called upon to exercise the functi of a jury or to issue contradictory decrees *Held,* however, in this case that one of the verd

NEW SOUTH WALES, LAW OF—*continued.*
should be set aside as against the weight of evidence. AUSTRALASIAN STEAM NAVIGATION COMPANY *v.* SMITH & SONS - - - 321

NUISANCE—Compensation—Lands Clauses Act
See LANDS CLAUSES ACT. [153

PARISH REGISTERS—Evidence - - 437
See LIMITATIONS, STATUTE OF. 1.

PEDIGREE—Evidence - - - 437
See LIMITATIONS, STATUTE OF. 1.

PERPETUITY—Crown grant of land - 286
See NEW SOUTH WALES, LAW OF. 2.

PLEDGE—Law of Lower Canada - - 637
See CANADA, LAW OF. 4.

POLICY — Fire insurance — Notice to terminate
See INSURANCE, FIRE. [98

—— Marine insurance — Proposal for "open cover" - - - - 83
See INSURANCE, MARINE.

POOR LAW—*Settlement—Derivative Settlement—Retention of Settlement after Sixteen — Child under Sixteen—Irremoveability—Emancipation—Widowed Mother—Residence as Wife and Widow —Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.] After the Divided Parishes Act 1876 came into operation a pauper's father acquired a settlement in Penge, and his wife and child thereupon took his settlement and never acquired any subsequent settlement in their own right. The pauper's mother was born in Reigate, which was her maiden settlement. After the father's death an order was made adjudging the last legal settlement of the pauper, then under the age of sixteen, to be in Penge:—*Held*, reversing the decisions of the Queen's Bench Division and the Court of Appeal (19 Q. B. D. 385), that under sect. 35 of the Divided Parishes Act 1876 the widow did not upon her husband's death revert to her maiden settlement; and that the pauper upon her father's death did not take the maiden settlement of her widowed mother, but retained her father's settlement in Penge, and that the order was right.—A pauper was born in 1861 at her father's birthplace in Wanborough. He died in 1868, and his widow married again. After her father's death the pauper (who was always physically incapable of work) resided with her mother in Rhydgwern without receiving relief till June 1880, when she became chargeable. In June 1880 the pauper had so resided at Rhydgwern for more than three years since the Divided Parishes Act 1876 came into operation (15th August 1876); viz., more than one year before she attained the age of sixteen (October 1877), and more than two years after attaining that age. An order having been made adjudging the last legal settlement of the pauper to be in Wanborough:—*Held*, reversing the decision of the Court of Appeal (20 Q. B. D. 97) and restoring the decision of Stephen and Charles JJ., that the order was wrong; that the pauper had, by her residence under the age of sixteen coupled with her residence over that age, resided for the term of three years" in Rhydgwern was to render her irremoveable, within the meaning of sect. 34 of the Act, and had therefore acquired a statutory settlement in that parish;

POOR LAW—*continued.*
and that this result was not affected by the provisions of sect. 35.—A pauper resided with her husband in a parish for more than three years continuously, and after his death continued to reside as a widow in the same parish for three months:—*Held*, affirming the decision of the Court of Appeal (21 Q. B. D. 278), that the settlement of the pauper and her children (who were all under six years of age) was in that parish, not on the ground that the pauper had acquired a settlement in her own right under sect. 34 of the Divided Parishes Act 1876, but on the ground that the husband had at the time of his death acquired a settlement in the parish under sect. 34, and that his widow and children took that settlement under sect. 35. GUARDIANS OF REIGATE UNION *v.* GUARDIANS OF CROYDON UNION. GUARDIANS OF HIGHWORTH AND SWINDON UNION *v.* GUARDIANS OF WESTBURY-ON-SEVERN UNION. GUARDIANS OF MEDWAY UNION *v.* GUARDIANS OF BEDMINSTER UNION - - - 465

POSSESSION—Heir—Action to recover land 437
See LIMITATIONS, STATUTE OF. 1.

POWER OF ATTORNEY—Revocation - 596
See NEW SOUTH WALES, LAW OF. 3.

PRACTICE — PRIVY COUNCIL — *Admission of Solicitor to practise as an Agent—Rules of* 31*st March*, 1870, *sects.* 2, 3.] Under sects. 2 and 3 of the Rules of 31st of March, 1870, only solicitors or others practising in London, or solicitors admitted by the High Courts in India or the corresponding Courts in the Colonies, can be admitted to practise in the Privy Council. The Judicial Committee have no power to extend at their discretion the class of those eligible. *In re* TWIDALE'S PETITION - - - - - 328

2. —— —— *Leave to appeal.*] Petition for special leave to appeal from a judgment of the Supreme Court of Canada exempting the respondents from payment of a tax specially assessed by the appellant corporation, refused; the exemption being under statute which the judgment did not appear to have construed erroneously.—Although a case may be of substantial character, and may involve matter of great public interest, and may raise an important question of law, yet the judgment sought to be appealed from may be plainly right or unattended with sufficient doubt to justify special leave being granted.—*Prince* v. *Gagnon* (8 App. Cas. 103) considered. LA CITÉ DE MONTRÉAL *v.* LES ECCLÉSIASTIQUES DU SEMINAIRE DE ST. SULPICE DE MONTRÉAL - - - 660

PRACTICE — SUPREME COURT — *Costs— Trial with Jury—Jurisdiction of Judge to deprive Plaintiff of Costs—"Good Cause"—Discretion—Appeal as to "Good Cause"—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66) *s.* 49—*Rules of the Supreme Court* 1883 *Order* LXV. *r.* 1.] In an action against a railway company for damages caused by their negligence tried by a judge with a jury the plaintiff recovered £50. The defendants having thereupon applied that the plaintiff should be deprived of costs under Order LXV., r. 1 of the Rules of the Supreme Court, 1843, the judge refused to exercise his discretion, but after some weeks heard both sides and made an order depriving the plaintiff of costs on the ground that he had supported

PRACTICE—SUPREME COURT—*continued.*

an extravagant and extortionate claim by fraudulent statements and dishonest acts and by evidence which the jury disbelieved:—*Held*, affirming the decision of the Court of Appeal, that the judge was not functus officio when he refused to exercise his discretion at the trial, that he had jurisdiction to make the order, and that the ground on which it was made constituted "good cause" within the meaning of Order LXV., r. 1.—By Lords Watson, Bramwell, and Herschell:—The concluding words of Order LXV., r. 1 of the Rules of the Supreme Court 1883 which give the judge or Court a discretion as to costs "for good cause" in trials with a jury, embrace everything for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense. So long as the judge or Court deal with considerations of that kind, the sufficiency or insufficiency of these considerations as affording a reason for disallowing costs are matters of which they are constituted sole arbiters; they are acting within their jurisdiction and their decisions are final and conclusive. On the other hand, if they give effect to considerations which do not constitute "good cause" within the meaning of the Rule, they exceed the limit of their jurisdiction; and on that ground their decisions are not protected from review.—The decision in *Jones* v. *Curling* (13 Q. B. D. 262) discussed. HUXLEY *v.* WEST LONDON EXTENSION RAILWAY COMPANY 26

2. —— —— *Pleading—Abuse of Procedure—Frivolous and Vexatious Statement of Defence—Jurisdiction to strike out Statement of Defence.*] There is an inherent jurisdiction in the High Court to strike out a statement of defence which is frivolous and vexatious and an abuse of the procedure. The appellant brought an action against his Bishop and the patrons of a benefice claiming a declaration that he was vicar of the benefice, and that an instrument of resignation which he had executed was void, and an injunction to restrain the Bishop from instituting and the patrons from presenting any other person to the benefice. The action was tried and judgment was given against the appellant on the ground that the vicarage was void by reason of his resignation thereof with the consent of the Bishop. Afterwards the respondent, having been duly appointed to the benefice as the appellant's successor, brought an action against the appellant claiming a declaration that the respondent was vicar and a perpetual injunction to restrain the appellant from depriving the respondent of the use and occupation of the house and lands. In his statement of defence the appellant set up the same case as that on which he had been defeated in the action in which he was plaintiff:—*Held*, affirming the decision of the Court of Appeal, that there was an inherent jurisdiction in the Court to strike out the statement of defence as frivolous and vexatious and an abuse of the procedure, and to enter judgment for the plaintiff with a declaration and injunction as claimed. REICHEL *v.* MAGRATH - - - - 665

3. —— —— *Staying Proceedings — Second Action for same Matter—Costs of former Suit.*] Where a plaintiff having failed in one action

PRACTICE—SUPREME COURT—*continued.*

brings a second action for the same cause of action the second action must be stayed until the costs in the first have been paid. And this is the rule in Ireland, as in England.—*Martin* v. *Earl Beauchamp* (25 Ch. D. 12) approved. M'CABE *v.* GOVERNOR AND COMPANY OF BANK OF IRELAND [413

—— Costs - - - - - - 98
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—— Privy Council—Leave to appeal - 590
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—— Scotch law—Joining issue on accounts—Proof at large - - - 576
See SCOTCH LAW. 4.

PREFERENCE SHARES—Distribution of surplus assets - - - - 525
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PRINCIPAL AND AGENT—Receipt of rents—Action to recover land - - 437
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PRIVILEGE—Libel - - - - 194
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—— Loss of—Remoteness of damage - 519
See DAMAGES.

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See COMPANY. 7.

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RAILWAY COMPANY—*Highway carried over Railway by Bridge—Repairs of Roadway of Bridge — Obligation of Company — Railways Clauses Consolidation Act* 1845 (8 & 9 *Vict. c.* 20), *s.* 46.] Where a railway crosses a highway, and the road is carried over the railway by means of a bridge in accordance with the provisions of sect. 46 of the Railways Clauses Consolidation Act 1845, the railway company are bound to keep in repair the roadway upon the bridge, such roadway being part of the bridge which by the section the company are to maintain.—The decision of the Court of Appeal (22 Q. B. D. 485) affirmed. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY *v.* MAYOR, &c., OF BURY - - - 417

—— Rates—Law of Quebec - - 590
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RATIFICATION—Principal and agent—Receipt of rents by agent - - - 437
See LIMITATIONS, STATUTE OF. 1.

REDEMPTION—Reconveyance - - 61
See MORTGAGE.

REGISTRATION—Designs - - - 559
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RESIDENCE—Poor law—Settlement - 465
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See BENEFICE.
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REVENUE—Income tax - - 381, 493
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RIVER—Riparian owner—Law of Lower Canada
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RULES OF SUPREME COURT, 1883, Order LXV.
r. 1. - - - - 26
See PRACTICE—SUPREME COURT. 1.

SAILING RULES—Art. 18 - - - 670
See SHIP. 3.
SCOTCH LAW—*Drainage and Improvement Companies Act*, 1856 (19 & 20 *Vict. c. lxx*), *ss.* 52–61; 23 & 24 *Vict. c. clxx.—Right in Security—Personal Action against Possessor of the Land—Private Act.*] By the Scottish Drainage and Improvement Company's Act, 1856 (19 & 20 Vict. c. lxx.), a company was incorporated for the purpose of advancing money for the improvement of land, the expenses of such improvement to be charged on the fee of the lands. By sect. 61 "every charge on land by virtue of this Act may be recovered by the company, or the person for the time being entitled to the same, by the same means and in like manner in all respects as any feu duties, or rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland":—*Held*, affirming the decision of the Court of Session (15 Court Sess. Cas. 4th Series, 108), that it was not competent for the company to maintain a personal action against a landowner for the annual charge upon the land under the Act. SCOTTISH DRAINAGE AND IMPROVEMENT COMPANY *v.* CAMPBELL [139
2. ——*"Succession—Nearest of Kin—Vesting—Post-nuptial Contract—Proceeds of Sale of Heritage by Minor moveable or heritable—Moveable Succession (Scotland) Act* (18 & 19 *Vict. c.* 23).] By post-nuptial contract, dated 1840, husband and wife conveyed their whole property (then consisting of moveables) each to the other in the event of his or her surviving, in liferent, and to their children in fee. The deed declared that the spouses reserved power severally to dispose of their respective estate by testament to take effect at the expiration of the liferent, "in the event of there being no children alive at the death of the predecessor, or dying in the lifetime of the survivor" of the spouses. A second declaration provided that in the same events and failing any such testament, then the whole estate "belonging or which may belong to the said husband shall fall to and become the property of his own nearest-of-kin;" a similar declaration provided as to the wife's property.—The husband purchased heritable estate in 1848, and died in 1858, without making any testamentary provision, survived by his widow and one child. This child died in 1863 of full age survived by an only son who was born in 1862. In 1877 the surviving spouse sold the heritable estate for £7500, executing a conveyance to the purchasers with the consent and concurrence of her infant grandson, the price £7500 being
SCOTCH LAW—*continued.*
handed to trustees to hold for those who should be found entitled under the post-nuptial contract. The infant grandson died in 1881 bequeathing any right he had to the £7500 to his grandmother. She died in 1885, disposing of the sum under her settlement:—*Held*, reversing the decision of the Court of Session (14 Ct. Sess. Cas., 4th Series, 368), that the term nearest-of-kin described the person who filled that character at the date of the death of the husband, and not at the date of the death of the liferentrix, who was the son: and that the grandson's will passed the £7500, the sale of the heritage by him not having been challenged within the prescribed period:—*Per* Lord Watson: The legal meaning of nearest-of-kin since the Moveable Succession Act of 1855, is no longer equivalent to legal heirs in mobilibus.—*Haldane's Trustees* v. *Murphy* (9 Court Sess. Cas., 4th Series, 269) doubted. HOOD *v.* MURRAY - - 124
3. —— *Trustee—Investment—Insufficient Security—Liability of Trustees and Law Agent—Beneficiary with Contingent Interest, Title to sue.*] The defender M. was trustee under a marriage contract, by which the wife's property was settled on herself for life, excluding the jus mariti; and, in case she survived her husband, to her in fee; but, should she predecease her husband, to him for life or until his second marriage; and lastly, in the event of her predeceasing her husband, to her children in fee, after her husband's decease or second marriage. The defender M. and the husband and wife—who were also trustees—lent this trust fund on the security of unfinished houses in course of erection under a building speculation. The only valuation the trustees had before them was one by an architect, which had been obtained by the borrower, but they consulted the defender H., who was their law agent, and were informed by him that there was no objection to the investment.—The deed contained an immunity clause exonerating the trustees from "omissions or neglect of diligence, or the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases."—The pursuers, the children of the marriage, while both spouses were alive, brought an action for a declarator that the defender M. and the law agent were jointly and severally liable to restore the fund, which had been lost by the failure of the speculation:—*Held*, reversing the decision of the Court of Session (15 Court Sess. Cas., 4th Series, 1033), that there had been a positive breach of duty on the part of the defender M., and that he was liable—the pursuers' rights being contingent, and the husband and wife being barred from any relief against him—to restore the trust fund by paying it to a judicial factor appointed by the Court to abide the event, if and when the pursuers became entitled:—*Held*, also, affirming the decision of the Court of Session, that the law agent was not liable, for there was no evidence to prove that he had been employed by the pursuers or any person on their behalf. RAE *v.* MEEK 558
4. —— *Trustee—Management—Trustees borrowing to pay Debts—Practice—Proof—Joining Issue on Accounts—Proof at large—Non-liability of Trustees for Furniture given to Widow for Life—Maintenance of Children out of Capital.*] All that the law requires from a trustee who has

SCOTCH LAW—*continued.*

power to sell or borrow, is that he shall follow the dictates of ordinary prudence in adopting the one course or the other; and the question, whether he did or did not act prudently, is one of fact to be solved according to the circumstances of each case.—The defenders, or those they represented, were appointed, under a settlement, with directions to pay debts and to pay a certain portion of the free income of the settled property to the widow of the settlor for the support, education, and putting out in the world of the children; and after the youngest child (then not born) reached thirty to sell or divide the estate, which consisted of house property in Glasgow, and to make such further advances for the maintenance and education of the children as the trustees should consider expedient. The trustees entered into office in 1857, and in 1858 borrowed a large sum to pay off, inter alia, a bond debt. The trust was sequestrated in 1867, all the creditors not being paid in full. The testator's furniture was liferented by the widow; she pledged it, and it was lost to the estate. In 1886 the pursuer and other children of the testator sought to make the trustees liable for not having sold the property instead of borrowing. The Court of Session recalled the Lord Ordinary's interlocutor allowing a proof and remitted the case to a reporter to inquire. When the cause returned the Court adopted a lower valuation for sale in 1857–8 than the reporter:—*Held*, reversing the interlocutor of the Court of Session (15 Court Sess. Cas., 4th Series, 417), that the pursuer was entitled to a limited proof to substantiate his averments as to the value of the property for sale when the trustees took office, and the defenders to a proof of their averments relating to the circumstances which induced the trustees to borrow on the security of the estate; but that the pursuer having joined issue, and been fully heard upon various questions of accounting before the reporter, was not entitled to reopen these questions in a proof at large:—*Held*, also, affirming the judgment of the Court of Session, (*a*) that the trustees were authorized to make payments to the widow and children, although those payments were out of capital: (*b*) that they were not liable for the loss of the value of the furniture. Binnie *v.* Broom - - - - - - 576

SETTLEMENT—Poor law - - - 465
See Poor Law.

SHARES—Preference shares - - 525
See Company. 1.

SHIP—*Charterparty—Marginal Note—Guarantee as to Ship's Capacity—Stowage of Machinery and Coal.*] By a charterparty made between the respondents and the appellants it was agreed that the appellants' vessel should proceed to Glasgow and there "load all such goods and merchandise as the charterers should tender alongside for shipment not exceeding what she could reasonably stow and carry, &c." It was provided that the freight should be a lump sum of £2200, and the charterparty contained this guarantee: "Owners guarantee that the vessel shall carry not less than 2000 tons dead weight," and this provision: "Should the vessel not carry the guaranteed dead weight as above any expenses incurred from this cause to be borne by the owners, and pro ratâ

SHIP—*continued.*

reduction per ton to be made from the first payment of freight." The cargo intended to be carried was a general cargo consisting in part of railway locomotive machinery, and a note was by consent of the parties written upon the margin of the charterparty specifying the "largest pieces" of machinery which were to be included in the cargo by number, weight, and measurement. The charterers tendered a cargo not in excess of 2000 tons dead weight, consisting of railway machinery, including locomotives and tenders, two parcels of coals, and general goods. The large pieces of machinery were much more numerous than specified in the marginal note. The vessel sailed with only 1691 tons dead weight. It was not disputed that she contained a carrying capacity up to the guarantee; and it was admitted that 2000 dead weight of the cargo tendered could not have been carried on the vessel unless the coal had been packed with the machinery, which was not done. The charterers claimed a deduction in the freight:—*Held* (reversing the decision of the Court of Session), that the marginal note amounted to a representation, and the cargo being such a cargo as was not contemplated, and the fact being that the vessel carried less than the guaranteed dead weight because the charterers tendered large machinery in excess of their representation, they were not entitled to the benefit of the stipulation for reduction of the freight, and the whole lump freight was payable:—*Held*, also (affirming the opinion of the Court of Session), that the stowage of coal among machinery without the consent of the shippers of the machinery and of the coal was not proper stowage, and that it was the duty of the respondents and not the duty of the appellants to obtain such consent. Mackill *v.* Wright Brothers - - - - - - 106

2. —— *Collision—Exceptional Current—Liability—Evidence of Negligence.*] Where a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself primâ facie evidence of fault, although such steamer is well equipped, and both officers and men are shewn to have been at their posts and on the outlook.—Where collision under such circumstances was attributable to the effect of an exceptional current, known to be a possible though improbable contingency, but it was shewn that the port anchor of the steamer was not in readiness, and that delay arose in dropping the starboard anchor, *held*, that the steamer had neglected ordinary precautions and could not be absolved from blame. "City of Peking" *v.* Compagnie des Messageries Maritimes - - - - - 40

3. —— *Collision—Fog—Regulations of* 1884 *for preventing Collisions at Sea, Art.* 18.] By art. 18 of the Regulations of 1884 for Preventing Collisions at Sea "Every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary." When two steamships, invisible to each other by means of a thick fog, find themselves gradually drawing nearer until they are within a few ships' length, they are within the second direction of art. 18, and each of them ought at once to stop and reverse: unless the fog-signals of the other vessel have unequivo-

SHIP—*continued.*

cally indicated that she is steered so as to pass clear without involving risk of collision; or unless other circumstances exist which make it dangerous to stop and reverse.—The decision of the Court of Appeal reversed upon the facts by Lord Halsbury L.C. and Lords Watson, Bramwell, Herschell and Macnaghten, the Earl of Selborne and Lord FitzGerald dissenting. OWNERS OF THE STEAMSHIP "LEBANON" *v.* OWNERS OF THE STEAMSHIP "CETO." THE "CETO." - 670

4. —— *Disbursements—Master of Ship—Maritime Lien for Necessaries—Admiralty Court Act* 1861 (24 *Vict. c.* 10) *s.* 10—*Admiralty Court Act* 1840 (3 *&* 4 *Vict. c.* 65) *s.* 6—*Merchant Shipping Act* 1854 (17 *&* 18 *Vict c.* 104) *s.* 191.] The Admiralty Court Act 1861 (24 Vict. c. 10) does not give the master a maritime lien on the ship for disbursements.—The decision of the Court of Appeal (12 P. D. 158) reversed.—*The Glentanner* (Swa. 415); *The Mary Ann* (Law Rep. 1 A. & E. 8); *The Feronia* (Law Rep. 2 A. & E. 65); and *The Ringdove* (11 P. D. 120) overruled. HAMILTON *v.* BAKER - - - - - - 209

5. —— *General Average—Jettison—Right to Contribution—Remedies—Lien on Goods salved.*] The right of contribution in respect of jettisoned cargo is based on the danger to ship and cargo requiring sacrifice to which all must contribute. Such right does not belong to the wrongdoers whose acts have led to the jettison, or to those who are legally responsible for them. Where a ship is stranded through the negligence of her master, and thereby ship and cargo are placed in a position of such imminent danger as to make it prudent and necessary to jettison part of the cargo in order to save the remainder and the ship:—*Held*, that innocent owners of the jettisoned cargo are entitled to general average; *secus* with regard to the owners of the ship unless their ordinary relations to the shippers have been varied by contract.—The rules of maritime law relating to the rights and remedies resulting from a proper case of jettison are:—(1.) Each owner of jettisoned goods becomes a creditor of ship and cargo saved. —(2.) He has a direct claim against each of the owners of ship and cargo for a pro rata contribution towards his indemnity; which he can recover (*a*) by direct action; (*b*) by enforcing through the ship master, who is his agent for that purpose, a lien on each parcel of goods salved to answer its proportionate liability. STRANG, STEEL & CO. *v.* SCOTT & CO. - - - - 601

SOLICITOR—*Costs—Taxation—Remuneration for conducting Sale by Auction when Auctioneer paid by Client—Scale Fees—Solicitors' Remuneration Act* 1881 (44 *&* 45 *Vict. c.* 44)—*Gen. Ord.* 1882, *ss.* 2, 4, 6, *Sched. I. Part I. r.* 11.] Part 1 of Sched. I. to the General Order of 1882 made in pursuance of the Solicitors' Remuneration Act 1881 (44 & 45 Vict. c. 44) prescribes an ad valorem scale fee for conducting the sale of property by public auction, and rule 11 provides that "the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer."—Where the auctioneer's commission is paid by the client:—*Held*, reversing the decision of the Court of Appeal, that rule 11 does not deprive the solicitor of all remuneration for work done in respect of the conduct of the sale, but that under the General Order sect. 2, sub-sect. (*c*), he is entitled to a quantum meruit for such work, the remuneration to be regulated according to the old system as altered by Sched. II.—*In re Newbould* (20 Q. B. D. 204) reversed. *In re Faulkner* (36 Ch. D. 566) approved. PARKER *v.* BLENKHORN. NEWBOULD *v.* BAILWARD - - - - - 1

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3 & 4 Vict. c. 65 (*Admiralty*), s. 6 - 209
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5 & 6 Vict. c. 35 (*Income Tax*), ss. 39, 100, 106, 108 - - - - - - 493
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30 & 31 Vict. c. 3 (*British North America*), s. 109 - - - 46, 295
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UTILITY—Design—Copyright - - 550
See Copyright.

VENDOR AND PURCHASE—*Rescission—Forfeiture of Deposit—Defect in Title subsequently discovered—Common Mistake—Action to recover Deposit.*] The conditions in a contract of sale of land provided that the purchaser should pay a deposit, and that if he failed to comply with the conditions the deposit should be forfeited and the vendors should be at liberty to resell. The purchaser paid the deposit, and accepted the title, but when the time for completion arrived he could not provide the residue of the purchase-money. The vendors thereupon gave the purchaser notice that the contract was rescinded and the deposit forfeited. Three years afterwards, the vendors having contracted to sell to another purchaser, it was decided that their title was bad, owing to a defect which had appeared upon the face of the abstract delivered to the f
first purchaser thereupon b
recover his deposit on the gro
take and failure of consideratio
the decision of the Court of Ap
that the title having been acc
posit having been forfeited sole
of the purchaser's default, he w
recover the deposit. Soper *v.* A

VICTORIA, LAW OF—*Administr*
—Grant of Administration vests t
the Date of Death—Rights of L
Wife's Administrator in respect of
Conveyance to her.] In an adminis
the next of kin of the intestate ag
band and administrator, it appeared
real estates had vested in the intesta
of certain voluntary conveyances b
(which contained covenants for furth
that the husband, after the intestate
ported to convey the said real estates
consideration, and thereafter insisted
obtained in his marital right admin
the deceased: that the alleged con
value was not bonâ fide; that a secon
ance was thereupon made, and considera
alleged to have been paid:—*Held*, that
Victorian Administration Act of 1872 t
of the husband's becoming administrat
wife's estate was that the estate passed t
from the date of the death, not beneficial
as trustee of his wife's assets, and under obli
to realize and apply and distribute them acc
to law. Consequently the conveyance b
husband, if made for value, and so as to d
the prior settlements, was a breach of trus
him; if not made bonâ fide, it was inopera
In either view the husband was chargeable
the value of the estates conveyed as part of
assets of the intestate. Harding *v.* Howell
[3

2. —— *Mortgage—Remedies of Mortgagor—Redemption—Detinue.*] Where there has been an equitable deposit of deeds to secure repayment of a loan an action of detinue cannot be maintained therefor prior to repayment. The remedy is by a suit for redemption, or by summary application for the deeds on terms of substituting for the security a sum of money equal to the amount secured with a proper margin. In cases of legal or equitable mortgage, a tender properly made and improperly rejected is not equivalent to payment. Bank of New South Wales *v.* O'Connor [273

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continued.
ecessary steps to obtain it.
ourt of Appeal (38 Ch. D. 56)
ons & Co. *v.* GOVERNOR AND
ew RIVER - - 698

aw of Jersey - - 70
y, LAW OF.

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tish GUIANA, LAW OF.

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